**REDACTED INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 04-313 AND CC DOCKET NO. 01-338**

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

In the Matter of

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| Unbundled Access to Network Elements | ) | WC Docket No. 04-313 |
| | ) | |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |

# REPLY COMMENTS OF BELLSOUTH CORPORATION


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## REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), for itself and its wholly owned affiliated companies, respectfully submits its reply comments in response to the *Notice.*[1]

## I. INTRODUCTION

Although more than 80 parties responded to the Commission's *Notice*, many disregard, in whole or in part, the directives of the Supreme Court and the United States Court of Appeals for the D.C. Circuit in an attempt to perpetuate an unlawful unbundling regime at the expense of true facilities-based competition. Others fail to present evidence to support their positions, advocate for lengthy transition periods, or seek state commission involvement in an effort to achieve the same result, albeit indirectly. The Commission should reject such proposals and should, at the conclusion of this proceeding, articulate *and apply* a clear and lawful impairment standard. Only by specifying those network elements that meet this standard and identifying where such elements must be made available on an unbundled basis can the Commission bring certainty and

[1] *Unbundled Access To Network Elements; Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Notice*" or "*Interim Order*"). BellSouth includes with its Reply Comments supporting affidavits, some of which have exhibits, as well as an Appendix. Citations to this material will be to "BellSouth Reply App." or to the Affiant's last name and the relevant paragraph number and/or affidavit exhibit.

closure to an industry in desperate need of both. It is not sufficient to clarify tests that will be applied later, defer impairment determinations until additional data can be gathered, or tinker slightly with the *Triennial Review Order* framework that the D.C. Circuit has clearly rejected.[2]

## II. SUMMARY

Competing Local Exchange Carriers ("CLECs") are not impaired without access to unbundled local switching. First, competitive circuit switching is abundant, and CLECs have been able to deploy numerous switches that are used to serve large geographic areas.[3] Second, intermodal alternatives are broadly available, serving both residential and business customers.[4] Despite the lack of impairment, certain commenters propose a number of schemes to perpetuate the continued availability of unbundled local switching – threshold tests, trigger tests, market-carve outs, and lengthy transitions -- but none has merit.[5]

CLECs are not impaired without unbundled access to high-capacity loops, transport, and dark fiber in central offices with 5,000 or more business lines. CLECs have deployed and continue to deploy extensive fiber optic networks through out the country. These competitive networks allow CLECs to self-provide loops and transport in significant quantities, not only in large cities but also in smaller cities with less population density.[6] BellSouth's market research

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 ("*Triennial Review Order*"), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, NARUC v. United States Telephone Ass'n,* Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[3] *See infra* at pages 7-8.

[4] *See infra* at pages 9-10.

[5] *See infra* at pages 11-18.

[6] *See infra* at pages 24-25 & 30-31.

confirms that CLECs have a significant share of the high-capacity market, including services provided at the DS-1 level. Intermodal alternatives also are readily available, and cable modems are used extensively by both small and medium-sized business to meet their telecommunications needs.[7]

CLEC claims of impairment also ring hollow, given their extensive use of special access services. Carriers use special access with more frequency than unbundled DS-1 loops, and the data presented by BellSouth demonstrates that carriers have made and are making business decisions to serve particular customers with special access rather than DS-1 UNEs.[8] Although CLECs offer various excuses to explain these business decisions, they do not change the fact that carriers can compete effectively without access to unbundled high-capacity loops, transport, and dark fiber from BellSouth.[9]

A number of parties agree that impairment for certain high-capacity services should be assessed based on the concentration of business lines in a central office. BellSouth's proposal of 5,000 business lines as the demarcation point for finding non-impairment is supported by data that analyzes both actual and potential competition. The other proposals offered by the various parties are not supported by any data, and the purported rationale for these proposals – that self-deployment is only economic in the most-dense areas -- is contradicted by network deployment of a number of CLECs that filed comments in this proceeding. The reasonableness of the CLECs impairment proposals might have been verified had the CLECs provided detailed

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[7] *See infra* at pages 24-27

[8] See infra at pages 45-46.

[9] *See infra* at pages 48-58

information about their network deployment, but, for whatever reasons, the CLECs elected not to do so.[10]

## III. THE IMPAIRMENT STANDARD

### A. Impairment Must Be Analyzed Based on Entry by a Reasonably Efficient Competitor.

There is nearly unanimous consensus that impairment must be analyzed based upon entry by a reasonably efficient CLEC.[11] However, while paying lip service to this standard, AT&T proposes that "the relevant inquiry must be carrier specific," which, according to AT&T, means that the fact that one carrier has deployed facilities does not mean that it would be economic for another carrier to do so.[12] AT&T's proposal must be rejected.

The notion that competitive entry should be judged on a carrier-by-carrier basis is both legally unsustainable and administratively unworkable. In fact, the Commission explicitly rejected this approach in the *Triennial Review Order*, finding that a focus on "individual requesting carriers" and their "particular business strateg[ies]" would "reward those carriers that are less efficient."[13] If an efficient carrier has deployed, for example, high-capacity facilities in a particular market, competition is possible without access to unbundled high capacity loops, transport, and dark fiber. Thus, there would be no basis for a finding of impairment even if

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[10] *See infa* at pages 34-38.

[11] *See* PACE Comments at 33, CompTel/ASCENT Comments at 7, ATX/Blackfoot *et al.* Comments at 4, NTS Comments at 3 and Sprint Comments at 14.

[12] AT&T Comments at 14, 17-18.

[13] *Triennial Review Order*, 18 FCC Rcd at 17056-57, ¶ 115.

another carrier that is less efficient or has adopted a different business plan might desire to have unbundled access to such high capacity facilities.[14]

Furthermore, AT&T makes no attempt to explain how the "carrier specific" impairment standard could ever practically be administered. Even assuming AT&T's approach were lawful, which is not the case, there is simply no reasonable mechanism by which the Commission can judge whether competitive entry is economic on a carrier-by-carrier basis. AT&T's impairment proposal is nothing more than a request for maximum unbundling under a different name and should be summarily rejected.

The same is true for Alpheus's proposal that the test for impairment should "be measured in the context of a reasonably efficient competitor that does not own or control other network elements or rights-of-way."[15] This proposal is inconsistent with the concept of economic competitive entry and cannot be reconciled with *USTA II.* First, actual competitive entry by any means other than UNEs is conclusive evidence that such entry is economic and cannot simply be ignored as Alpheus proposes.[16] Second, the D.C. Circuit has required the Commission to consider competition through competing platforms in assessing impairment, including

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[14] AT&T conveniently overlooks the D.C. Circuit's directive that impairment cannot be established based upon a competitor's specific business plan or preferred technology. *See USTA v. FCC,* 290 F.3d 415, 429 (D.C. Cir. 2002) (*"USTA I"), cert. denied,* 538 U.S. 940 (2003) (finding "quite unreasonable" the Commission's position that its impairment inquiry could be limited to copper loop facilities by defining the service that a competitor seeks to offer as "DSL," as opposed to broadband); *USTA II,* 359 F.3d at 580 (affirming the Commission's determination that "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs are unable to complete with ILECs in the broadband market, there would still be vigorous competition from other sources").

[15] Alpheus Comments at 80.

[16] *USTA II,* 359 F.3d at 592 (finding that the existence of competition by means other than UNEs "belies any suggestion that the lack of unbundling makes entry uneconomic").

competitive platforms such as cable that have their own networks and access to the rights-of-way.[17]

### B. The Commission Should Not Find That Carriers Are Impaired by Virtue of State Social Pricing Policies.

BellSouth agrees with those commenters who believe that the Commission should not find impairment by virtue of the implicit subsidies resulting from the social pricing of telephone services.[18] Such subsidies are unrelated to whether there are structural barriers to deploying particular network facilities or whether competitors can reasonably duplicate such facilities, which, as the D.C. Circuit has made clear, must be the hallmark of any impairment analysis.[19]

Although some commenters argue otherwise, their positions cannot be taken seriously. For example, while insisting that the Commission's consideration of "retail rates below historic costs" is "proper," the Loop and Transport CLEC Coalition ("CLEC Coalition") does not attempt to explain how social pricing has anything to do with natural monopoly barriers to competition, which is the analysis the D.C. Circuit directed the Commission to conduct.[20] The same flaw undermines Sprint's recommendation that the Commission's impairment analysis should "consider record evidence on the existence and impact of any lingering implicit subsidies on a location-specific basis;" there is no justification for the Commission to consider factors that

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[17] *Id.* at 572-73 (in conducting an impairment analysis, "the Commission cannot ignore intermodal alternatives").

[18] *See, e.g.,* AT&T Comments at 12; Verizon Comments at 28.

[19] *See USTA I,* 290 F.3d at 422 (when below-cost retail rates exist in certain markets, it cannot be said that the absence of unbundling would "impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial"); *USTA II,* 359 F.3d at 573 (below-cost retail rates are unrelated to "structural features that would make competitive supply wasteful").

[20] CLEC Coalition Comments at 29-30.

impact impairment unless such factors are the result of a natural monopoly, which is not the case with respect to social pricing for telephone service.[21]

ALTS proposes that the Commission address the D.C. Circuit's concerns regarding social pricing (as well as competitive entry) by making a "modest" adjustment so that impairment would be found when "the effect may be to substantially lessen competition in the retail services that utilize the network element."[22] Such a change would hardly be "modest" but rather would require dramatically shifting the impairment analysis from an "uneconomic entry" standard to a "lessening competition" standard, which is used in evaluating corporate mergers under the federal antitrust laws. This dramatic shift would: (1) improperly focus on a competitive harm that has not necessarily materialized and may be entirely hypothetical; (2) fail to answer the concern expressed in *USTA II* about the Commission's impairment standard; and (3) create problems in conducting an impairment analysis that are greater than those ALTS's proposal is ostensibly intended to solve.[23]

## IV. LOCAL CIRCUIT SWITCHING

### A. Switching Alternatives Are Abundant.

The record is clear that competitive switches are numerous and that CLECs have been able to self-deploy circuit switches to provide service to their customers. In addition, facilities-based competition has grown through the use of packet switches, broadband loops, and wireless

[21] Sprint Comments at 21-23. As to Sprint's gratuitous suggestion that the Commission can effectively address "retail cross-subsidies" by adopting the proposal to reform intercarrier compensation and universal service offered by the Intercarrier Compensation Forum ("ICF"), this is hardly the proceeding for the Commission to consider the ICF's proposal. Indeed, it will take the Commission considerably longer to resolve issues surrounding universal service and intercarrier compensation than the time allotted to this proceeding.

[22] ALTS Comments at 7-8.

[23] *See* Banerjee Reply Declaration, ¶¶ 12, 15, 21, 25.

networks. As a result, ILECs are now losing substantial numbers of customer lines – and even greater shares of traffic and revenues – to cable, voice over Internet Protocol ("VoIP"), and wireless providers, which is fatal to CLEC claims that they are impaired without access to unbundled local circuit switching.[24] In fact, carriers such as AT&T and Sprint are deafeningly silent with respect to switching, which is an implicit acknowledgment that no impairment exists for unbundled switching.

A plethora of CLECs erroneously argue that the Commission should either disregard, or accord lesser weight, to the real intermodal competition that currently exists.[25] Such arguments range from claims that the Commission must narrowly focus on preserving wireline competition to suggestions that a cable versus wireline duopoly will result if unbundled access to local circuit switching is curtailed to assertions that wireless service has not yet blossomed into a mature wireline alternative. None of these arguments is persuasive.

Such arguments rest on the faulty premise that the D.C. Circuit blessed the Commission's approach in the *Triennial Review Order* to accord lesser weight to intermodal alternatives, which is simply not the case. The D.C. Circuit ruled that the Commission "cannot ignore intermodal alternatives," although it did not address the weight the Commission assigned to such alternatives, stating "[w]hether the weight the FCC assigns to this factor is reasonable in a given context is a question we need not decide."[26] Nonetheless, any approach that discounts intermodal competition because such competition is not open to those competitors seeking to offer a particular service or utilize a particular service would contravene the D.C. Circuit's

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[24] *UNE Fact Report 2004,* at I-4.

[25] *See* Comments of MCI at 86-87, the PACE Coalition at 11, Dialog at 3, the National ALEC Association at 5-6, Momentum at 11, NTS at 11-13.

[26] *USTA II*, 359 F.3d at 572.

directive that any impairment analysis must be consistent with the goal of the 1996 Act, which is to "stimulate *competition* – preferably genuine, facilities-based competition."[27] Thus, in conducting its impairment analysis, the Commission must consider whether competition is impaired, not whether particular competitors are impaired, which requires that intermodal alternatives be given substantial weight in the process.[28]

That some intermodal alternatives may not be "mature" as compared to wireline telephone service is inconsequential. For example, despite any alleged lack of "maturity," cable is already a significant competitor in the telecommunications market, serving both residential and business customers. The availability of cable modem and other broadband service options has contributed to the exponential growth of VoIP, and already competitors such as AT&T and Vonage are reducing their prices in efforts to attract market share away from the ILECs.[29] Thus, while service provided by cable, VoIP, and wireless may not be as "mature" as traditional wireline service, they are already formidable competitors.[30]

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[27] *Id.* at 576 (emphasis added).

[28] The independent body of the New York State Department of Public Service ("NYDPS") apparently agrees; in its comments, NYDPS states the commission should recognize current market conditions by expressly placing substantial weight on intermodal competition. NYDPS Comments at 4-5.

[29] BellSouth Reply App. at 19.

[30] MCI's approach to intermodal competition is particularly egregious. MCI claims that intermodal competition is irrelevant to assessing impairment, and objected to producing any evidence concerning its packet switches in state proceedings. BellSouth Reply App. at 1. In its comments in this proceeding, MCI provides its total circuit switch count, but omits any mention of packet switches, claiming that technology advances will only result in benefits to residential customers "[t]en years from now." MCI Comments at 34. However, a cursory review of MCI's website tells an entirely different story. For example, MCI claims: it has "[t]he most rigorously engineered IP backbone network;" it has the most "robust set of converged communications services in the industry, including integrated voice, data, and Internet services;" its global IP network can circle the globe more than four times; it offers the fastest speeds available over IP today; its VoIP service – available since 2001 – was expanded in March 2004; and it is collaborating with Microsoft to provide VoIP services and integrate a PC and telephony solution as of May 2004. BellSouth Reply App. 10-11. Based on such statements, MCI's desire to avoid

Furthermore, any suggestion that intermodal alternatives should be discounted in assessing impairment because they are not available to business customers is misguided.[31] A number of intermodal providers, including "bring-your-own-access" VoIP providers, have actively entered the marketplace in recent months, targeting both residential and business customers. In addition, cable operators are aggressively deploying fiber to office buildings and extending their networks to business districts, and, as a result, a substantial percentage of business customers have selected cable as their telecommunications provider of choice.[32] This data provide compelling evidence of the depth and breadth of intermodal competition and requires that such competitive alternatives must be given substantial weight in assessing claims of impairment.[33]

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the Commission's consideration of intermodal alternatives appears to be driven more by economic self-interest rather than by any principled approach to impairment. Intermodal competition is robust enough that analysts anticipate most UNE-P lines will eventually transition to intermodal alternatives. BellSouth Reply App. at 13. Also, wireless carriers tout their all digital networks as offering exceptional quality. BellSouth Reply App. at 17-18.

[31] AT&T Comments at 76.

[32] *UNE Fact Report 2004*, I-7 & III-37 (noting industry studies that 41 percent of "enterprises," 32 percent of "middle market" businesses, and 44 percent of small business were using cable service in their main offices for some high-capacity services); Tipton Reply Affidavit, ¶¶ 4-5.

[33] As a final effort to derail a fair evaluation of intermodal alternatives, certain commenters attacked the quality and ability to relay emergency information through 911 of certain intermodal alternatives. *E.g.* MCI Comments at 102. These attacks also must fail and are readily dispelled through a cursory review of recent trade releases and CLEC websites. For instance, MCI announced on August 3, 2004, that its MCI Advantage product "is one of the industry's first Voice over Internet Protocol (VoIP) solutions to support 9-1-1 capabilities at fixed locations." BellSouth Reply App. at 11. MCI touted its abilities, explaining that "[w]e are able to offer MCI Advantage customers, who order service for fixed locations, the same benefits they would expect from their traditional phone service." *Id.* Cbeyond makes similar claims about the E911 capabilities of its private IP network. *Id.* at 16.

### B. The Commission Should Reject Any Switching Threshold Test.

Several parties propose a "threshold" test to switching, with the threshold ranging from 150 CLEC lines per wire center to 3,500 CLEC lines per wire center.[34] Under these proposals, until the specified threshold has been reached, it purportedly is uneconomic to self-provide switching, and ILECs should continue to be required to provide local switching on an unbundled basis. There is no reason for the Commission to adopt such thresholds proposals because: (1) the abundance of competitive switches and the existence of intermodal alternatives provide dispositive evidence that competitive entry is economic without unbundled switching; (2) they are inconsistent with *USTA II;* and (3) they are not grounded in, let alone supported by any facts.

The question of whether an efficient CLEC can enter a market and compete without unbundled local circuit switching is readily answered in the affirmative given the evidence of actual competition that exists in the marketplace. If actual carriers are competing successfully without access to unbundled switching, it must be true that an efficient CLEC could do likewise and thus competition is possible without unbundled switching. Because actual competition through self-provided circuit switches and intermodal alternatives demonstrates that competition is possible without unbundled switching, there is no impairment and thus no need to resort to any "threshold" test.

Indeed, the CLEC switching threshold proposals conveniently overlook that CLECs have already deployed a switch or have a switching presence in many of the same wire centers where they are purchasing unbundled switching from BellSouth as part of the UNE-P. These UNE-P

[34] To facilitate the Commission's review, BellSouth includes in its Reply Appendix at 20 its summary of the faulty threshold proposals in tabular format.

arrangements could readily be served using existing CLEC switching capabilities without meeting any threshold test.[35] Furthermore, the CLECs have known for some time that UNE-P was in legal jeopardy; they could and should have made alternative serving plans rather than waiting for some self-serving threshold to be met.

The CLECs' switching threshold proposals also run afoul of *USTA II*. By limiting the threshold consideration to the level of competition that currently exists, the threshold approach violates the D.C. Circuit's directive that impairment be assessed based on more than where there is actual competition, i.e., where competition is "possible." By limiting the threshold consideration to a particular CLEC, the threshold approach violates the requirement that impairment be assessed based on competition in generally, and not individual competitors.[36] Finally, by limiting the threshold consideration to a particular wire center, the threshold approach violates the requirement that the geographic market be defined "sensibly," since CLECs do not self-deploy switches to serve only a single wire center.[37]

Finally, by and large, the majority of "threshold proponents" fail to provide any data that would support their particular thresholds, and those that do so offer proposals that are carrier-

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[35] Tipton Reply Affidavit, ¶ 8.

[36] CompTel/ASCENT Alliance Comments at 45; PACE Coalition Comments at 84; NTS Comments at 20. As CompTel explains "the Commission should note that any non-impairment finding should properly be limited to the specific CLEC who has obtained sufficient market penetration to satisfy the 1500-line threshold." This qualification contradicts the Commission's view that it "will not, as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs." *Triennial Review Order*, 18 FCC Rcd at 17056, ¶ 115.

[37] Unlike the CLEC switching threshold proposals, BellSouth's proposal that impairment for high capacity loops, transport and dark fiber be assessed based on the concentration of business lines in a particular wire center meets the requirements of *USTA II,* as discussed *infra* beginning at p. 23. BellSouth's proposal takes into account both actual and potential competition; assesses competition on a broad basis without regard to the effect on CLECs individually; and utilizes a "sensible" definition of the geographic market that conservatively reflects the manner in which CLECs self-deploy high-capacity facilities.

specific. Whatever data have been presented focuses upon evaluating impairment from the perspective of a specific CLEC, which this Commission and the D.C. Circuit has made clear is not the appropriate inquiry and is administratively unworkable.[38]

### C. The Commission Should Reject Efforts to Apply Revised "Trigger" Tests.

Various commenting parties, most notably MCI, present this Commission with the alleged results of state impairment proceedings and focus on claimed shortcomings in the "trigger" analysis in an attempt to preserve continued access to unbundled local switching. Both MCI, the PACE Coalition, and others suggest that, by conducting a wholesale review of state records, the Commission can simply mend its trigger analysis by performing each of the previously delegated tasks itself. Following such an approach would be legally indefensible, particularly when the Commission's trigger tests cannot be reconciled with *USTA II*.[39]

By definition, the trigger tests represent an actual competition standard; by mandating the presence of multiple competitors in a particular market, the trigger tests require that the market be fully competitive before there is a finding of no impairment. However, in *USTA II* the D.C. Circuit affirmed that the critical inquiry is not whether a market is fully competitive but rather

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[38] *See Triennial Review Order,* 18 FCC Rcd at 17057, ¶ 115 (noting that "a carrier- or business plan-specific approach would be administratively unworkable for regulators, incumbent LECs, and new entrants alike because it would require case-by-case determinations of impairment and continuous monitoring of the competitive situation").

[39] There are a host of problems with MCI's attempt to have the Commission make a decision based on its summary of state impairment proceedings. As a preliminary matter, none of the state commissions in BellSouth's region completed its impairment proceeding and adopted formal findings based on the evidence presented; indeed, the Florida Commission recently closed its docket and opted not to file a summary with this Commission. BellSouth Reply App. at 6. And, MCI's analysis is premised upon the applicable market being defined as a wire center, even though CLECs do not make entry decisions about switching at a wire center level. BellSouth Reply App. at 2. Rather, CLECs typically advertise on a much broader scale, and CLECs' switch architecture can serve a wide-ranging geographic area that vastly exceeds the boundaries of a single wire center. Tipton Reply Affidavit, ¶¶ 7-9.

whether CLECs are capable of competing without UNEs – that is, whether "competition is possible" without UNEs in a particular market.[40] Since the impairment standard does not encompass an "actual competition" test, the Commission could not apply such a test as the prerequisite for a non-impairment finding, which would be the case under the Commission's trigger analysis.[41]

Furthermore, even assuming a trigger test approach was lawful, which is not the case, the triggers are and continue to be subject to such manipulation that the tests have been rendered essentially useless. This is illustrated by MCI's proposal to add new criteria to the Commission's now vacated triggers analysis; namely, that a CLEC must achieve a percentage market share in a given market before qualifying as a trigger.[42] How would the market be defined? How would the total service in the market be determined? How would any particular CLEC's share of that market be calculated? MCI never says, which is yet another example of CLECs' twisting an ostensibly "bright-line" test into a quagmire that cannot be navigated.[43]

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[40] *USTA II*, 359 F3d. at 575; *see also id.* at 571 (issue in conducting impairment analysis is "whether a market is suitable for competitive supply").

[41] Several CLECs also propose that the Commission apply its trigger tests in assessing impairment for purposes of high-capacity facilities. The Commission's trigger tests cannot be lawfully utilized in analyzing impairment regardless of whether the UNE in question is switching or high-capacity loops, transport and dark fiber.

[42] MCI Comments at 114.

[43] CLEC manipulation of the Commission's trigger tests was not limited to switching. For example, in the state impairment proceedings, CLECs insisted that the Commission's self-provisioning triggers for high-capacity loops applied to individual customer locations within a multi-tenant building. Under this approach, an individual end user would have to be served by two or more competing providers in order for the trigger to apply, in which case unbundling relief would only extend to that particular end user, which is a nonsensical result. Padgett Reply Affidavit, ¶ 24. Likewise, the CLECs sought (and continue to seek) to impose a requirement of "operational readiness" on each trigger candidate that could not reasonably be met under the best of circumstances. *See* Alpheus Comments at 51-56; Padgett Reply Affidavit, ¶ 25.

### D. The Commission Should Reject Proposed Rural Area "Carve Outs."

CLECs also seek continued access to unbundled local switching in certain rural areas. Similar to other threshold proposals, however, these claimed "rural exemptions" are not based on any objective data. Moreover, in many instances, CLECs that seek this "niche" protection offer as support a claimed business plan that is geared toward a certain customer segment alone. These CLECs disregard that this Commission has already explained that, even under an economic impairment analysis, it must assume a carrier will broadly serve customers.[44] Furthermore, there is no dispute that the current generation of switches can serve broad geographic markets, and a CLEC is not impaired simply because its business plan involves serving only a limited geographic area or only a particular segment of the market.

### E. The Commission Should Reject CLEC Attempts to Segment the "Mass-Market."

The Commission can and should reject those claims by commenters' seeking to partition the impairment analysis into gerrymandered markets, such as proposals that the Commission conduct a separate residential impairment analysis. Such proposals are premised upon the historic universal service subsidies inherent in below-cost residential rates, which, as explained above, is not a valid consideration for impairment purposes.

In addition, while commenters claim the sky will fall if residential customers can no longer order services made possible by artificial competition, such claims discard entirely the fact that BellSouth will provide local circuit switching to competitors even in the absence of

[44] Specifically, the Commission explained "[w]e consider *all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *Triennial Review Order,* 18 FCC Rcd at 17047, ¶ 100 (emphasis in original). Further, the Commission noted "[i]n our impairment analysis, we examine both whether new entrants can provide retail services over non-incumbent facilities and whether new entrants can provide wholesale services over non-incumbent facilities." *Id.*, ¶ 101.

unbundling – albeit under commercial rates, terms, and conditions. To date, BellSouth has reached 22 agreements to provide switching on a commercial basis and other carriers can avail themselves of similar arrangements, if they choose to do so.[45] Moreover, those carriers that desire to engage in niche residential or rural service offerings can do so utilizing an alternative that does not run afoul of a proper impairment inquiry and that does not inflict negative unbundling costs upon the industry.[46]

### F. The Commission Should Reject Attempts to Perpetuate Access to Unbundled Local Circuit Switching Under the Guise of a Lengthy Transitional Mechanism.

In addition to self-serving threshold tests, many CLECs claim a need for UNE-P as an entry strategy or otherwise seek to maintain lengthy access to unbundled circuit switching.[47] The purported logic for these proposals is that, with time, carriers will eventually be able to economically self-provide switching. However, CLECs have already had ample time with which to build a customer base, and many CLECs have invested in their own switches. That some CLECs preferred to ignore the changing competitive landscape, and have made little or no effort

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[45] Tipton Reply Affidavit, ¶ 13.

[46] As to the APCC's suggestion that the Commission engage in a specific analysis for CLECs seeking to provide service to payphone service providers, this Commission has already established the methodology by which it sets rates for payphone service providers ("PSPs"). In a series of orders, the Commission has explained payphone service providers can obtain cost-based rates based upon the new services test. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-128 & 91-35, *Report and Order*, 11 FCC Rcd 20541 (1996); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-128 & 91-35, *Order on Reconsideration*, 11 FCC Rcd 21233 (1996); *Wisconsin Public Service Commission; Order Directing Filings,* Bureau/CPD No. 00-01, *Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002), *aff'd New England Pub. Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004).

[47] *See* Reply App. at 20.

to self-deploy facilities or make other arrangements for switching is a self-created problem.[48] The fact that any *individual* CLEC may not yet have amassed a customer base sufficient in its own view to justify facilities is beside the point, since an evaluation of impairment must focus on competition generally, not individual competitors.[49]

Commenting parties also fail to adequately justify their repudiation of total service resale as a viable entry strategy to serve residential customers. For example, although ACN concedes that UNE-P margins generate over 35% profit margin,[50] it also admits its typical service arrangement using resale would "yield" $5.10. That UNE-P generates greater margins fails to justify continued access to unbundled local switching as an entry strategy.[51] Because CLECs will retain resale access to ILEC services and can also avail themselves of BellSouth's commercial switching offer notwithstanding any elimination of unbundled local circuit switching, there is no need to provide lengthy transition periods or to carve out unbundled access to UNE-P to further preserve CLEC profit margins.

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[48] Moreover, CLECs have a variety of switching options; next generation switches can cost as little as little as $100,000. BellSouth Reply App. at 14.

[49] ACN aptly illustrates the fallacy of the CLECs' arguments. On the first page of its Comments, ACN explains that it began providing local service in January 2003. One year later, in January 2004, ACN began utilizing UNE-P to provide local service in several BellSouth states. BellSouth Reply App. at 3. Both ACN's entry into the market and subsequent expansion occurred after the D.C. Circuit had vacated unbundled access to switching in its 2002 *USTA I* decision. To suggest, as ACN does, that additional access to switching is a needed entry strategy when it elected to launch its UNE-P offerings during a time of regulatory uncertainty is fanciful at best.

[50] ACN Comments at 9.

[51] *Iowa Utils. Bd.,* 525 U.S. at 389-90 (the Commission cannot give substance to the impairment standard by "regarding any increased cost or decreased service quality as establishing a necessity and an impairment of the ability to provide services").

### G. The Commission Should Reject Attempts to Perpetuate Access to Unbundled Local Circuit Switching in the Name Of Competition.

As a final effort to preserve unbundled access to local circuit switching, several commenters and state commissions suggest that continued access to UNE-P will advance competition. The problems with such arguments are well documented in a Report to the U.S. Chamber of Commerce ("Report"),[52] which shows that administrative mandates under the 1996 Act have adversely impacted competition generally and the telecommunications industry specifically. Thus, the cruel irony resulting from the current unbundling regime is that – despite any artificial competition that has resulted – the Report suggests that regulatory reform and less reliance on network sharing would yield far greater benefits to the overall economy. Given that Congress originally thought the 1996 Act would provide for a "deregulatory national policy framework," would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies," and would ensure the future growth of the *industry* domestically and internationally, pleas to preserve a regime that has had precisely the opposite effects must be rejected.

## V. BELLSOUTH'S HOT CUT PROCESSES

### A. BellSouth's Hot Cut Process Is Effective

BellSouth has an operational, effective and efficient hot cut process. No CLEC has credibly rebutted this fact. In fact, few CLECs even commented on hot cuts, and of those few, several mentioned batch hot cuts only in passing. Consequently, there are no grounds upon which the Commission can conclude that BellSouth's hot cut processes create unbundled switching impairment.

[52] BellSouth Reply App. at 5.

With respect to BellSouth's batch hot cut process, by which batches of loops are effectively transferred from one carrier's switch to another carrier's switch, BellSouth's process includes the majority of the components the CLECs claim are necessary. For example, AT&T advocates the use of project management. Project management is the cornerstone of BellSouth's batch process, which allows "project-managed, after-hours, bulk transfers of customers, on a central office and competitive carrier basis."[53]

The CLECs insist that a batch hot cut process must include IDLC, which BellSouth's process does. Furthermore, BellSouth employs eight different methods to provide loops provided via IDLC equipment on an unbundled basis to requesting CLECs.[54] There are, therefore, no loops in BellSouth's network that cannot be provided on an unbundled basis.[55]

The CLECs also argue that a batch hot cut process should include migrations to a third party switch, which BellSouth's process does. At the request of AT&T, BellSouth revised the batch hot cut process to include third party migrations.[56]

CLECs also want certainty in cutover time, which BellSouth's process provides. BellSouth's process provides that coordinated cutovers will be completed within a four-hour time window, either 8 AM-12 PM, or 1 PM-5 PM, at the customer's request. In addition, BellSouth's process includes after-hours cutovers, which allow the CLEC to select specific

[53] Ainsworth Reply Affidavit, ¶ 8.

[54] *Id.*, ¶¶ 13, 14.

[55] To manage effectively the conversion of loops provided over IDLC, BellSouth reasonably limits the number of IDLC conversions performed during a day. The limitation is reasonable in that migrations of lines involving IDLC facilities require an outside dispatch on the due date to perform the conversion. Ainsworth Reply Affidavit, ¶¶ 8, 16. The maximum number of hot cuts involving IDLC equipment in BellSouth's process is 70 per day per central office; which translates into the ability to perform approximately 112,000 IDLC conversions across BellSouth's region in any given day. *Id.*, ¶ 14. AT&T has presented no evidence to demonstrate that this limitation is unreasonable.

[56] *Id.*, ¶ 23.

accounts within the batch to be converted within a 1, 2, 5, or 8-hour window of time outside of the BellSouth normal business hours.[57]

MCI states that a batch hot cut process must have a reasonable cutover interval, which BellSouth's process does. Currently, BellSouth's interval is 15 days for batch migrations, decreasing to 8 business days on October 29, 2004.[58] Both the 15-day and the 8-day interval are reasonable in that the batch process is designed to migrate UNE-P customers to UNE-L. Thus, the end-user already is a CLEC customer – it is simply a matter of migrating that end-user to a different service offering by the same CLEC provider. The batch scenario, therefore, is different than the individual hot cut scenario in which the CLEC most likely is winning the customer from the ILEC for the first time and thus speed of conversion is essential.

AT&T argues that a batch process must include "all migrations."[59] BellSouth's process includes a variety of migrations from one carrier's switch to another carrier's switch.[60] Moreover, while BellSouth's process does not include every loop type, it does include each of the loop types commonly used in the mass market. For example, while the batch process does not include High bit-rate Digital Subscriber Line capable loops, it is extremely unlikely that any CLEC would have a quantity of mass-market customers in a single central office each

[57] Ainsworth Reply Affidavit, ¶¶ 27, 29. The use of the four-hour window during business hours balances the realities of a batch hot cut (which can include hundreds of lines) with the customer's need for certainty. While AT&T argues that it needs a specific time commitment for each loop, (Declaration of John S. Sczepanski, Mark David Van de Water and Sharon E. Norris on Behalf of AT&T Corp., ¶ 18 ("Sczepanski Declaration")), this solution is neither practical nor efficient. It is far more effective to allow a technician to process a group of orders in whatever order is fastest than encumbering technicians with an overly detailed timetable. In addition, coordination of the time and migration sequence to the level sought by AT&T would add cost to the process in the form of added work steps and additional network personnel. Ainsworth Reply Affidavit, ¶ 28.

[58] Ainsworth Reply Affidavit, ¶ 32.

[59] *See* Sczepanski Declaration, ¶ 53.

[60] Ainsworth Reply Affidavit, ¶ 34.

purchasing this loop type so as to make the use of the batch hot cut process efficient for cutting over this type of loop. Indeed, no CLEC has presented evidence of a batch of loops it wanted to convert that BellSouth cannot accommodate.

BellSouth also provides, as the CLECs advocate, timely and informative cutover notifications and includes a throwback process that allows BellSouth to restore a customer to BellSouth's switch in the event there is a problem with the cutover. BellSouth's notification methods in the batch hot cut process allow CLECs to monitor, track, and verify their batch hot cut orders and to take corrective action promptly in response to problems that might arise during the process. The throwback process is based on the opportunity that CLECs have to test and either accept or turn back the loop and allows a CLEC to request a throwback within 24 hours of the UNE-L due date. [61]

The few components advocated by the CLECs that BellSouth's batch hot cut process does not include are not unnecessary. For example, AT&T argues that it needs the ability to sequence the cutovers in a batch migration. However, the batch hot cut process is intended to move large volumes of lines to UNE-L quickly and efficiently. Sequencing, like time-specific hot cuts, would add unnecessary cost and decrease the efficiencies gained by batching the orders. Individual accounts with special dialing patterns such as hunting may best be served by utilizing BellSouth's project management process option rather than the batch hot cut process.[62]

### B. BellSouth's Hot Cut Process Works

As BellSouth predicted in its initial comments, while the CLECs make unsubstantiated allegations about BellSouth's hot cut performance, they failed to produce credible data or, in

[61] *Id.*, ¶¶ 36-38, 40-41.

[62] *Id.*, ¶ 33.

most cases, any data at all to support such allegations. BellSouth's months and months of exemplary performance data stand in sharp contrast to AT&T's summary conclusions about a "limited" UNE-L trial it conducted more than **six** years ago. Moreover, BellSouth's 98% on-time due date performance on Supra's cutovers stands in sharp contrast to Supra's unsubstantiated rhetoric about BellSouth's process.[63]

BellSouth also engaged PriceWaterhouseCoopers ("PwC") to perform a robust third-party test of its batch hot cut process to bolster the extensive commercial usage of its individual hot cut process, which specifically tested "whether the process work[s] as described in the ILEC's oral and written representations" as advocated by AT&T.[64] AT&T's argument that BellSouth's process is deficient because PwC failed to make a qualitative judgment about the process loses sight of the fact that, in this case, it is the Commission that makes the qualitative judgment about the appropriateness of the process – the auditors are engaged to verify that the process works, which PwC did in this case.[65]

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[63] *Id.*, ¶¶ 54-57, 59.

[64] *See* Sczepanski Declaration, ¶ 87; Ainsworth Reply Affidavit, ¶ 61.

[65] Ainsworth Reply Affidavit, ¶ 61. AT&T's further criticisms of the PwC test also are meritless. For example, AT&T questions the independency of PwC, even though PwC provides services to 82% of the Fortune Global 500 and has performed attestation services for AT&T itself. Ainsworth Reply Affidavit, ¶ 62-63 (citing Deposition of Paul Gaynor at 15) ("I've given attestations for AT&T") (excerpts of Mr. Gaynor's deposition are included in BellSouth's Reply App. at 12) (also citing Deposition of Mark Van de Water; the relevant page is included in BellSouth's Reply App. at 15). Likewise, while AT&T claims that the PwC test is invalid because BellSouth changed the process after the test had begun, Sczepanski Declaration, ¶ 106, BellSouth changed the process in large part to fulfill the requests of AT&T. AT&T also tries to discredit the PwC test by claiming that PwC did not explain "when and over what period of time the pre-wiring (the most time-intensive part of the hot cut) was completed" and did not provide "information regarding how the non-hot cut central office was handled." Sczepanski Declaration, ¶ 108. However, both of these issues were adequately explained when AT&T deposed a representative of PwC, and it is unclear why AT&T is raising the same issues here as if that deposition had never taken place. Ainsworth Reply Affidavit, ¶ 74; BellSouth Reply App. at 12.

Although AT&T points to certain deviations PwC noted during the test,[66] these deviations had no material impact on customers or on BellSouth's overall performance in the test. For example, although one deviation noted that BellSouth missed one step in the process on six telephone numbers, all six conversions were completed successfully. Similarly, another deviation noted that the BellSouth central office technician did not completely follow the process for one of 724 bulk hot cuts, but even as to the one cut in question, it was completed successfully with the correct telephone number. In short, despite the few immaterial deviations, PwC concluded that the test validated the sufficiency of BellSouth's process.[67]

### C. BellSouth Has Robust Performance Measurements for Its Hot Cut Process.

To ensure on-going performance quality, BellSouth has both existing and proposed hot cut measures. BellSouth currently has in place four measures specific to hot cuts that include cutovers made in the batch process. In addition, BellSouth has proposed two new hot cut measures to capture hot cut components that are unique to batch hot cuts. BellSouth also has proposed to its state commissions to modify four of the ordering measurements to include, rather than exclude, project managed hot cuts.[68] Of the thirteen measures AT&T recommends,[69] nine

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[66] Sczepanski Declaration, ¶¶ 108-09.

[67] Ainsworth Reply Affidavit, ¶¶ 73, 70, 69, 64. In lieu of the robust test BellSouth already conducted, AT&T asks the Commission to require a second test, which is excessively burdensome and unnecessary. BellSouth's test covered the key goals advocated by AT&T and was based on "pseudo testimony and commercial deployment using actual customer accounts" as AT&T urges. The only substantive difference between the PwC test and the test envisioned by AT&T is that the latter would take place over period lasting six months to a year. Thus, AT&T wants a test that would take longer, would cost more, and would overly burden BellSouth's workforce, even though it would not lead to any more credible results than the robust test PwC already has completed. Ainsworth Reply Affidavit, ¶¶ 75-80.

[68] *Id.*, ¶¶ 81-104, 87-88, 91, 93-102.

[69] *See* Sczepanski Declaration, ¶ 199.

are already covered in BellSouth's measurements and the remaining four fail to capture any meaningful data.

### D. BellSouth's Batch Hot Cut Rate Is Reasonable.

The rate for BellSouth's batch hot cut process is a 10% discount off of the applicable nonrecurring rate of the loop to account for the efficiencies gained by using the batch process.[70] BellSouth's nonrecurring rates were set by its nine state public service commissions, and such rates are the same as or lower than the rates this Commission approved in BellSouth's 271 applications.

AT&T's challenge to the hot cut rates on the grounds that the hot cut rates are higher than UNE-P rates is a red herring.[71] Provisioning a UNE-P does not require physical work – provisioning a UNE-L does. The cost difference between the two is as simple as that. The state commissions already considered and accounted for the differences in the two processes when they established BellSouth's nonrecurring rates.[72]

## VI. HIGH-CAPACITY TRANSPORT, LOOPS, AND DARK FIBER

### A. Competitive High Capacity Alternatives Are Abundant.

There is no serious dispute that the level of competitive high-capacity facilities is extensive and continues to grow. The route miles of fiber optic cable comprising CLEC networks in the United States increased by more than 80% in the past two years.[73] Likewise, the

[70] Ainsworth Reply Affidavit, ¶¶ 105-06.

[71] *See* Sczepanski Declaration, ¶ 184.

[72] Ainsworth Reply Affidavit, ¶ 109.

[73] Compare *UNE Fact Report 2002* at I-1, Table 1 (noting that as of year-end 2001, CLECs had deployed at least 184,000 route miles of high-capacity facilities), with *UNE Fact Report 2004* at I-2, Table 1 (noting that as of year-end 2003, CLEC networks consisted of 324,000 route miles of high-capacity facilities).

average number of CLEC networks in the top 50 MSAs increased by approximately 30% during the same time period.[74] Thus, claims that CLECs are universally "impaired" without access to unbundled high-capacity loops, transport, and dark fiber are simply not credible.

Some parties seek to brush away such extensive competitive deployment, arguing that it was "uneconomic" and is merely a vestige of an earlier time, which they say proves nothing about impairment.[75] Besides being unsubstantiated by any facts, such arguments ignore that competitive fiber deployment continues to this day.[76] Indeed, AT&T's network has increased by 2,500 local route miles in the past two years alone.[77]

Furthermore, regardless of when such facilities were deployed, CLECs concede that they are self-providing high-capacity transport to a significant degree. For example, Advanced Telecom notes that the majority of its high-capacity transport facilities are self-provided,[78] while KMC self-provides high capacity transport from its switches to at least three (3) ILEC central offices in *each of the 35 metropolitan areas* in which it operates a network.[79] Other CLECs

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[74] Compare *UNE Fact Report 2002* at I-1, Table 1 (noting that as of year-end 2001, there were an average of 16 CLEC networks in the top 100 MSAs), with *UNE Fact Report 2004* at I-2, Table 1 (noting that as of year-end 2003, there were an average of 19 CLEC networks in the top 50 MSAs).

[75] *See, e.g.,* AT&T Comments, at 18, 63 (referring to competitive fiber deployment as being the result of a "build it and they will come" strategy that was unsuccessful).

[76] *See UNE Fact Report 2004* at III-3, n.8 (noting that of those CLECs reporting the number of buildings served directly on their networks for the past two years, four reported increases in the number of buildings served, one of which – Time Warner Telecom – added 313 buildings).

[77] *Id.*

[78] Declaration of Dan J. Wigger on Behalf of Advanced Telecom, Inc., ¶ 33 ("Wigger Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition.

[79] Declaration of Mike Duke on Behalf of KMC Telecom Holdings, Inc., ¶ 7 ("Duke Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition.

acknowledge that high-capacity transport facilities are readily available from carriers other than the incumbent.[80]

The evidence also establishes that CLECs are self-providing high-capacity loop facilities or obtaining such facilities from other CLECs.[81] This evidence is consistent with BellSouth's experience and market research, which reflects that CLECs have a substantial percentage of the high capacity loop market in BellSouth's region.

**[BEGIN PROPRIETARY DATA]**

[80] *See, e.g.,* Declaration of Rebecca H. Sommi on Behalf of Broadview Networks, Inc., ¶ 8 ("Sommi Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition (Broadview Networks is able to obtain transport from alternate vendors a substantial percentage of the time); Declaration of David A. Kunde, Eschelon Telecom, Inc., ¶ 6 ("Kunde Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition (a majority of Eschelon collocation arrangements can be served via alternative transport providers); Declaration of Warren Brasselle on Behalf of Talk America Inc., ¶ 10 ("Brasselle Declaration") (Talk America is able to purchase interoffice transport from other CLECs on a substantial percentage of its system routes).

[81] *See, e.g.,* Wigger Declaration, ¶¶ 18-19 (noting commercial buildings served by Advanced Telecom's "own loops facilities"); Declaration of Mark A. Jenn, ¶ 9 ("Jenn Declaration"), submitted with Comments of ATX/Blackfoot (noting that TDS has found evidence of carriers offering wholesale access to loop facilities in downtown areas of major metropolitan areas); Wengert Declaration, ¶ 10 (acknowledging that BayRing has self-provisioned its own DS-1 and DS-3 loops); *see also UNE Fact Report 2004* at III-3 (noting that "[m]any CLECs acknowledge that they now serve a significant percentage of their customers entirely over their own facilities").

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**[END PROPRIETARY DATA].**

Cable also is a viable alternative to the ILECs' high-capacity facilities. Although AT&T insists that "[w]ith few exceptions, cable infrastructures generally do not 'pass' business locations and thus cannot readily serve the vast majority of office buildings and other business sites,"[84] the truth is otherwise. According to industry analysts, between 45 to 48 percent of small office/home office and small businesses use cable modems as their telecommunications solution of choice; this number is expected to grow to more than 60% in the near future.[85]

In short, there are numerous competitive alternatives for high-capacity loops and transport and dark fiber. In light of such clear and convincing evidence, the Commission cannot lawfully re-institute its findings of national impairment with respect to high-capacity loops, transport, and dark fiber, notwithstanding CLEC claims to the contrary.[86]

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[84] AT&T Comments at 76.

[85] Tipton Reply Affidavit, ¶ 5.

[86] *See, e.g.,* AT&T Comments at 52; MCI Comments at 138.

### B. CLEC Reliance on Data Developed in the State Impairment Proceedings Is Misplaced.

In a misguided attempt to perpetuate unbundling of high capacity facilities in the absence of evidence of impairment, several CLECs invite that the Commission to utilize data gathered during the state impairment proceedings.[87] The Commission should decline this invitation.

In an attempt to bolster their impairment claims, most CLECs rely upon an "analysis of state specific loop and transport data" prepared by QSI Consulting Inc. ("QSI"). This "analysis" allegedly draws from data developed in 14 state impairment proceedings initiated in response to the *Triennial Review Order* and purports to show, despite overwhelming evidence in this docket to the contrary, that competitive high capacity loops and facilities are allegedly scarce. QSI's "analysis" is misleading and proves nothing.

As an initial matter, assessing impairment based upon data regarding competitive deployment of high-capacity facilities obtained during the state proceedings is not a particularly useful exercise. First, such data were gathered and presented based on an invalid approach to impairment. For example, QSI and several CLECs seek to suggest that certain ILECs have conceded impairment by virtue of their not attempting to establish that the triggers had been met in particular states or not presenting a potential deployment case under the *Triennial Review Order* guidelines. However, the trigger tests in the *Triennial Review Order* cannot be reconciled with *USTA II*, for the reasons explained below. Furthermore, while the Commission expressed its expectation that a finding of no impairment would be made when the evidence in the state proceedings demonstrated "the potential ability of competitive LECs" to compete without

[87] *See, e.g.,* AT&T Comments at 52-54; CLEC Coalition Comments at 101-02.

UNEs,[88] the Commission not only unlawfully delegated to the states the authority to conduct the impairment inquiry, but also, as the ILECs explained, structured the inquiry in such a manner that was "so open-ended that it imposes no meaningful constraints on unbundling, and would be unlawful even if applied by the FCC itself."[89] Under the circumstances, it is not surprising that some ILECs declined to devote the resources to participating fully in an unlawful process employing an amorphous unbundling standard, and their decision not to do so hardly constitutes an admission of "impairment."[90]

Second, CLECs were less than forthcoming in disclosing information about their deployment of high capacity facilities and intentionally manipulated the process to avoid having to disclose data that they knew would undermine their impairment claims. For example, during the discovery process in BellSouth's region, AT&T denied self-providing transport along a single route in any BellSouth state, which is absurd on its face given the tens of thousands of fiber route miles comprising AT&T's network. AT&T rationalized its refusal to disclose the locations of high-capacity transport by narrowly defining the term to include only facilities directly between two ILEC central offices, contrary to the *Triennial Review Order*. Similarly, other carriers refused to disclose the location of self-provisioned high capacity loops because such facilities did not terminate in an ILEC central office, even though such facilities are being used to serve end-user customers.[91]

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[88] *Triennial Review Order,* 18 FCC Rcd at 17299, ¶ 506.

[89] *USTA II*, 359 F.3d at 571.

[90] Despite such concerns, BellSouth was an active participant in the state impairment cases, including presenting a potential deployment case for high-capacity loops and transport. MCI's claims to the contrary (at 147) are false. Padgett Reply Affidavit, ¶ 30.

[91] Padgett Reply Affidavit, ¶ 23.

Even assuming that data obtained in the state proceedings regarding competitive deployment of high capacity facilities were useful in assessing impairment in this docket (which is not the case), such data has been improperly and unfairly manipulated by QSI to reduce artificially the magnitude of competitive deployment. For example, QSI arbitrarily deleted from its analysis routes and locations identified by ILECs if the route or location was not disclosed by a CLEC in a discovery response. However, a number of CLECs never responded to the questions they were asked, and other providers of high-capacity facilities were not even subject to discovery. QSI also "removed" buildings or locations unless the CLEC expressly "acknowledged" that it was self-providing facilities at specific capacity levels, even if it was technically and economically feasible for the CLEC to do so.[92]

In short, the findings offered by QSI concerning the extent of CLEC owned and operated loop and transport facilities are simply not credible. This is abundantly clear from the limited facts presented by CLECs in this docket, which completely contradict QSI's "findings."[93] Furthermore, any "findings" by QSI based upon selectively manipulated data presented in 14 state proceedings could hardly be used to make an impairment determination in other markets across the country.[94]

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[92] *Id.*, ¶ 32.

[93] For example, according to QSI's analysis, there are no CLEC self-provided transport routes in either California or Washington. QSI Report at 17 (table 5). However, Advanced Telecom, which operates local fiber networks in four Western states, including California and Washington, readily acknowledges that a substantial percentage of the interoffice routes in its system are self-deployed. Wigger Declaration, ¶ 33.

[94] For example, QSI claims that it found two or more wholesalers offering DS-1 and DS-3 wholesale loops in only 36 and 49 buildings, respectively, in the states it reviewed. However, the database maintained by Sprint of "Alternative Access Vendors [AAVs], which it defines as "CLECs that offer facilities to other carriers," includes thousands of buildings that "have potentially two or more AAVs reaching any portion of the building." Sprint Comments at 46.

It is no surprise that the CLECs seek to rely upon QSI's seriously flawed "analysis" in an attempt to establish impairment instead of providing the Commission with specific information about their high capacity loop and transport deployment. This is entirely consistent with the approach taken by the CLECs in the state impairment proceedings and is part and parcel of their "hide the ball" strategy.

As evidence of this strategy, the Commission should look no further than the declarations of KMC Telecom and XO, which, by all accounts, are two of the largest facilities-based CLECs in the country. Both companies operate networks consisting of thousands of route miles of fiber optic facilities, yet neither KMC nor XO bothers to provide specific details about these networks. For example, KMC notes that it "has deployed its own transport facilities in established collocations in certain ILEC and IXC central offices," although it fails to disclose where those facilities and collocations are actually located.[95] Similarly, while noting that extending its "fiber networks directly to large enterprise customers is an important aspect of [its] business plan," KMC fails to disclose the locations of the enterprise customers it serves directly with its own high capacity loop facilities, the specific types of facilities it has self-deployed, or the specific services that such facilities are used to provide.[96]

Similarly, XO admits that it builds its "own fiber optic facilities into a building and create[s] a DS-1 or DS-3 channel connecting to [its] backbone network," but fails to disclose any details about the location or quantity of such facilities.[97] XO candidly admits that buildings

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[95] Duke Declaration, ¶16.

[96] *Id.*, ¶ 8.

[97] Declaration of Wil Tirado on Behalf of XO Communications, Inc., ¶ 6 ("Tirado Declaration"), submitted with Initial Comments of the Loop and Transport Coalition.

"directly" on its fiber rings can be served with its "own loop facilities."[98] *Id* at 14. However, again, other than providing a map of its San Francisco fiber ring, XO does not bother offering any details about the number of buildings located directly on its rings deployed in scores of MSAs or the quantity and types of services it provides with its own facilities to its tens of thousands of customers.

The omission of such information is particularly critical, given the markets these carriers service. For example, according to KMC, it has constructed "fiber-based networks in mid-sized cities."[99] That carriers have self-deployed fiber networks in cities other than the largest metropolitan areas completely undercuts claims that high-capacity transport is only economic on a "handful of extremely high density routes."[100] That such data may be harmful to the CLECs' impairment claims may explain why they have not provided it.

While at the same time withholding detailed information about their networks, CLECs complain that the competitive data presented by BellSouth and the other ILECs are "overstated."[101] The CLECs have unique access to information that would allow the Commission to arrive at a more informed impairment analysis, such as the locations where they have self-provisioned high capacity facilities and the locations where they provide service using special access or facilities leased from other carriers. The CLECs should have provided such information to the Commission but instead chose not to do so. BellSouth and the other ILECs have presented available data to demonstrate the extent of competitive deployment. While the

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[98] *Id.*, ¶ 14.

[99] Duke Declaration, ¶ 5.

[100] AT&T Comments at 25.

[101] *See, e.g., id.* at 71.

data understates alternative deployment, it certainly is reasonable and can be relied upon by the Commission.[102]

Despite pleas by carriers for a return to the days of the Commission's "ordering unbundling first and finding impairment later," those days are long over.[103] The Commission cannot lawfully order that high-capacity loops, transport, and dark fiber be unbundled unless there is substantial evidence that CLECs are impaired without unbundled access to such network elements. No such evidence has been presented by the CLECs, which have opted instead to withhold relevant information that is likely fatal to their impairment claims.[104]

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[102] BellSouth utilized information provided by GeoResults, which reviews data in Telcordia's Central On-Line Entry System ("CLONES") database of CLLI codes. Although AT&T claims that the CLONES database does not indicate whether the service in question "is provided via CLEC-owned fiber or via ILEC special access services," (Declaration of Jeffrey D. Beemon on Behalf of AT&T Corp., ¶ 4 ("Beemon Declaration")), this information can readily be determined from various fields in the database. Padgett Reply Affidavit, ¶ 34. AT&T also suggests that the CLONES database contains "obsolete data." Beemon Declaration, ¶ 5-8. But the fact that equipment and facilities may not be "in active use" does not alter the fact that fiber and equipment have been deployed and are still in place and could be used to provide service at any time. Padgett Reply Affidavit, ¶ 35.

[103] AT&T continues to cling to the fanciful notion that the Commission can require unbundling even in the absence of impairment because of "administrability concerns." AT&T Comments at 25-26. Unfortunately for AT&T, the D.C. Circuit has rejected such an approach. *See USTA II*, 359 F.3d at 579-80 (expressly rejecting CLECs' claims that the Commission can "order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved").

[104] Although Sprint insists that CLECs have an "incentive" to disclose specific data about their competitive networks, (Sprint Comments at 29), the CLEC comments and declarations filed in this proceeding, which are generally devoid of any specific information, suggest otherwise. Furthermore, Sprint maintains a comprehensive database that identifies the location of tens of thousands of buildings where CLECs offer facilities to other carriers, but Sprint has declined to provide the Commission any detailed information from this database, with the exception of a high-level summary. Sprint Comments at 46, Appendix A.

### C. Impairment for High Capacity Facilities Must Be Analyzed Consistent with Competitive Entry.

#### 1. MSA or wire center level impairment analysis is appropriate.

In analyzing impairment, the Commission must identify the relevant geographic markets, which should be defined in a manner consistent with competitive entry.[105] The evidence in the record conclusively demonstrates that competitors seeking to provide high capacity services enter broad geographic markets, such as Metropolitan Statistical Areas ("MSA") by initially placing facilities to serve key business customers in multiple wire centers. This is clear from the declarations of several CLECs in this proceeding.[106] Because competitors enter a market to provide high capacity facilities on a broad geographic basis, the geographic market for purposes of analyzing impairment for high capacity loops, transport, and dark fiber must be judged at either the MSA or wire center level.[107]

#### 2. Impairment should be analyzed based upon business line concentration.

In its initial comments, BellSouth proposed that the Commission find that CLEC are not impaired without access to unbundled high capacity loops, transport, and dark fiber in central

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[105] *USTA II*, 359 F.3d at 574 ("[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment" occurs); *See also USTA I*, 290 F.3d at 426 (the Commission must adopt "a more nuanced concept of impairment than" one that is "detached from any specific markets or market categories").

[106] Advanced Telecom defines the markets it has entered as "distinct cities within the four states in which Advanced Telecom has both facilities-based network coverage and field operations personnel." Wigger Declaration, ¶ 12. *See also* Kunde Declaration, ¶ 3 (noting the cities and "tier I and II markets" in which Escelon currently offers service); Tirado Declaration, ¶ 2 (noting the facilities that XO uses to serve numerous "metro area markets"); Duke Declaration, ¶ 3 (noting the facilities used by KMC to serve numerous "metro area markets").

[107] BellSouth believes that geographic markets may be defined differently for purposes of switching and high capacity facilities, given that a CLEC may deploy a switch to serve a larger geographic area than a CLEC serving with high capacity loop and transport facilities.

offices with 5,000 or more business lines.[108] Other parties concur with this general approach, recognizing that a sufficient concentration of business lines in a particular geographic market indicates that CLECs are not impaired without unbundled access to certain high-capacity facilities.[109] However, there is disagreement about the requisite level of concentration that should be required.[110]

For example, the Loop and Transport CLEC Coalition ("CLEC Coalition") proposes that non-impairment be found for transport between central offices "with at least 50,000 switched access business lines," provided that the end points of the route are located in the same LATA in a top MSA and there are at least four fiber-based collocations at both ends of the route.[111] Similarly, ALTS proposes that non-impairment be found on interoffice transport in any MSA as long as the transport routes connect "two wire centers with 40,000 business lines and above ...."[112] However, these specific proposals are unsupported by any evidence and are legally misguided.

BellSouth has provided extensive data in support of its high capacity loop, transport, and dark fiber unbundling proposal. This data establish a strong relationship between wire centers with a concentration of 5,000 or more business lines and indicia of actual and potential

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[108] BellSouth Comments at 39-50.

[109] *See, e.g.,* ALTS Comments at 82 ("Wire centers serving relatively large concentrations of business lines offer relatively large revenue opportunities to competitors").

[110] *See, e.g.,* Verizon Comments at 82 (proposing elimination of unbundling of high-capacity UNEs in wire centers with 5,000 or more total business lines and for wire centers where business lines account for 30 percent or more of the total lines in those wire centers); SBC Comments at 69-70 (proposing elimination of DS1 transport facilities only between wire centers with 10,000 or more business lines, or between one such wire center and a wire center with between 5,000 and 10,000 business lines).

[111] CLEC Coalition Comments at 82.

[112] ALTS Comments at 81.

competition (i.e., fiber based collocation arrangements, BellSouth average annual special access revenues, existing CLEC-lit buildings, and CLEC use of special access services to serve end users).

By contrast, the CLECs have presented no evidence in support of their unbundling proposals. For example, the CLEC Coalition presents no data that remotely suggests that its 50,000-business line proposal is reasonable, and it is unclear how this threshold was even developed. Indeed, the declarations of the CLEC Coalition's own witnesses contradict any suggestion that interoffice transport cannot economically be provided except between central offices in the same LATA with 50,000 or more business lines.[113] For example, the fact that KMC has self-deployed interoffice transport between numerous ILEC central offices in various mid-sized cities, which almost certainly do not have 50,000 or more business lines, underscores the arbitrariness of the CLEC Coalition's approach.[114] Furthermore, the CLEC Coalition's proposal is legally flawed because it appears to assess impairment only by considering routes that the CLEC Coalition believes feature "construction of interoffice facilities by multiple CLECs," even though competitive entry by multiple providers is not a prerequisite to a finding of non-impairment.[115]

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[113] According to XO's Director of Transport Architecture, Wil Tirado, a route between ILEC central offices in a top 50 MSA with 50,000 or more business lines is but just one *"example"* of dense traffic routes for which there is no impairment. Tirado Declaration, ¶ 38 (emphasis added). Another example, according to Mr. Tirado, would be "routes between two ILEC access tandems," and he readily acknowledges that "competitive supply of interoffice transport facilities" exists on routes serving ILEC central offices with "relatively few business lines," although he claims such routes are "rare." *Id.* The declaration of Dan Wigger, Vice President – Network Engineering and Operations for Advanced Telcom, contains practically identical language. Wigger Declaration, ¶ 44.

[114] Duke Declaration, ¶ 5.

[115] *Compare* Wigger Declaration, ¶ 44 (identifying routes where "we see the construction of interoffice facilities by multiple CLECs"), *with USTA II*, 359 F3d. at 575 (critical inquiry in assessing impairment is not whether a market is fully competitive but rather whether CLECs are

The same flaws undermine ALTS's proposal to use 40,000 business lines as the threshold to determine impairment. ALTS does not offer any data to support the use of this threshold, and the testimony of its own witness indicates clearly that competitive deployment of interoffice transport has occurred in offices with fewer than 40,000 business lines.[116]

It would have been a simple enough exercise for both the CLEC Coalition and ALTS to present evidence supporting their proposals. For example, they readily could have identified each wire center where their member companies either self-provide high-capacity transport or obtain such transport from another carrier and then obtain the number of business lines in each such wire center. Such data might have verified the reasonableness of establishing a threshold of 40,000 or 50,000 business lines, which likely explains why neither the CLEC Coalition nor ALTS sought to do so.

It is equally telling that neither the CLEC Coalition's nor ALTS's proposals would result in any meaningful unbundling relief, even on the "very dense routes" for which they concede there is no impairment.[117] For example, under the CLEC Coalition's proposal, BellSouth would be required to continue providing unbundled interoffice transport on nearly every route in its region because only nine of BellSouth's 1,574 wire centers (0.5%) have 50,000 or more business lines, and only five are in the same LATA (three in the Atlanta LATA and two in the Miami LATA). The same is true under ALTS's proposal because of the 16 BellSouth wire centers with

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capable of competing without UNEs - that is, whether "competition is possible" without UNEs in a particular market); *see also USTA II* 359 F.3d at 571 (issue in conducting impairment analysis is "whether a market is suitable for competitive supply").

[116] Declaration of Rainer Gawlick on Behalf of Lightship Telecom, ¶ 8 ("Gawlick Declaration"), submitted with Comments of ALTS/Blackfoot, *et al.*

[117] CLEC Coalition Comments at 82; *see also* AT&T Comments at 25 (admitting that wholesale transport is available "for a handful of extremely high density routes," but not identifying the location of such routes or the size of the wire centers they serve).

40,000 or more business lines (1%), only two LATAs have more than one such office (six in the Atlanta LATA and three in the Miami LATA).[118] The CLECs have constructed their proposals in such a manner that they have no practical limiting effect and result in unbundled interoffice transport continuing to be made available on nearly a ubiquitous basis, which is yet another reason for the Commission to reject such proposals.

### 3. A route-by-route or building-by-building impairment analysis should be rejected.

The Commission also should reject proposals to define the market based on individual loop arrangements or transport routes.[119] Such proposals ignore the evidence in the record, which conclusively demonstrates that competitors do not enter the market on a discrete route-by-route or building-by-building basis. Rather, they design a network to provide service throughout a broad geographic market, which generally comprises an MSA or, at the very least, multiple wire centers, as is apparent from an examination of maps of CLEC local fiber networks.

Several CLECs suggest that defining the geographic market based on a route-by-route or building-by-building basis is consistent with the D.C. Circuit's expectation that the Commission would take a more "nuanced" view of impairment. While the D.C. Circuit placed particular emphasis on a "sensible definition" of the relevant market for conducting impairment analysis, nothing in either *USTA I* or *USTA II* can be read to support a "granular" geographic market definition based on routes or buildings. Rather, the Court of Appeals was simply endorsing a more expansive view of the relevant product market, namely, the inclusion of not merely UNEs

[118] Padgett Reply Affidavit, ¶ 59.

[119] AT&T Comments at 16; CLEC Coalition Comments at 32-35.

but also facilities of like functionality, even if offered under different terms and conditions than UNEs.[120]

Defining the market on a route-by-route or building-by-building basis also is not defensible from an economic perspective. Although several CLEC economists claim that, because end-user customers of enterprise loops and transport cannot find feasible substitutes *outside* the point-to-point routes over which they make calls, the geographic market cannot be any larger than those point-to-point routes (or, route-pairs) themselves, the "customer" for impairment analysis purposes is the competitive carrier, not the end user. For the *competitive carrier* that seeks to transport traffic over a particular route, it has the option to seek out alternate routes when the cost to transport on a particular route rises.[121] In fact, it is not uncommon for transport routes to be not direct or point-to-point. In these circumstances, any attempt to define the geographic market as strictly point-to-point route-pairs would be a mistake, since the relevant market should contain all possible direct and indirect routes that could enable the CLEC to feasibly transport its traffic from one point to another.[122]

Furthermore, a discrete route-by-route or building-by-building impairment analysis is legally problematic. Because the Commission must consider whether a market is suitable for competition, the route-by route or building-by-building analysis is only the first step for the Commission to identify the common elements that make competition possible in locations other

[120] *USTA II*, 359 F.3d at 425 (requiring the Commission "to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation").

[121] Banerjee Reply Declaration, ¶ 32.

[122] *Id.*

than those where actual competition is already occurring.[123] Indeed, the process has been made even more complicated by the failure of the CLECs to even identify the routes and buildings where they are already competing.

To illustrate the problem, any point-to-point analysis for loops would have to assess thousands of hundreds of thousands of routes connecting various buildings. A loop is not just a connection between an ILEC central office and the end user premises but also would include connections to each of multiple CLEC fiber networks. And the shortest connection may well be to the CLEC fiber ring that passes through the building. Under the CLECs' approach, the Commission would have to identify all of the various routes, assess the characteristics that are common to each of these routes, and then determine other similar routes where deployment would be economic. This would be a mammoth undertaking that would be difficult, if not impossible to complete in any reasonable period of time.

AT&T falsely argues that defining the geographic market on a route-by-route basis "is not in dispute at all" because special access services are "point-to-point connections," as economists for BellSouth and other ILECs have "repeatedly argued" in other proceedings.[124] However, even a cursory review of the economic testimony cited by AT&T plainly reflects that BellSouth and the other ILECs' economists have not endorsed a route-by-route geographic market. For example, in the Affidavit of Karl McDermott and William E. Taylor in CC Docket No. 99-24, cited by AT&T, Drs. McDermott and Taylor note the difficulties of applying geographic market concepts to "telecommunications services," but nonetheless opine (¶ 12) that

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[123] *See USTA II*, 359 F.3d at 575 (Commission must consider "facilities deployment along similar routes when assessing impairment").

[124] AT&T Comments at 16.

defining the market "on a statewide basis is appropriate." In the. Declaration of Professor Robert Harris in CC Docket 01-337, which also was cited by AT&T, Dr. Harris concluded that "the geographic scope of the market for broadband access is local." However, Dr. Harris did not address special access and never opined that the geographic market for transport services should be analyzed on a route-by-route basis, notwithstanding AT&T's suggestion to the contrary.

Finally, some CLECs also seek to justify a route-by-route approach by insisting "offices on both ends of a route must generate substantial originating traffic to make self-deployment economic."[125] However, modern fiber optic transport systems are symmetrical in nature. That is, two transmit paths (which can be thought of as being a "send" path and a "receive" path) are established and both paths work at the same time. Because each path has identical "bandwidth" or transmission speed, the economics in determining whether to self-deploy a fiber facility are assessed based on the maximum amount of transmission capacity simultaneously required in total between the end points rather than the direction of the traffic. Thus, the CLEC position that there must be sufficient originating traffic on both ends of a route is incorrect.[126]

### 4. A capacity impairment analysis should be rejected.

The Commission also should reject proposals to analyze impairment based upon the capacity of the loop, transport, or dark fiber facilities.[127] Such proposals are unduly restrictive and ignore the manner in which fiber optic networks are deployed.

There is no disagreement that fiber optic systems allow a range of transmission rates, given the application of different electronic equipment attached to the ends of the fiber optic

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[125] Gawlick Declaration, ¶ 11.

[126] Milner Reply Affidavit, ¶¶ 9-10.

[127] *See, e.g.,* AT&T Comments at 22; CLEC Coalition Comments at 36.

strands. The capacity of a working fiber optic system is, in practice, rarely limited to the maximum "throughput" of the fiber optic strands themselves but rather by the maximum transmission speed of the attached electronics.[128]

Carriers typically deploy fiber-optic facilities that can operate at a range of capacities determined by the electronics attached to them. When laying fiber, it makes sense to deploy OCn facilities so that there will be enough bandwidth to handle all traffic on a given route and leave additional capacity available for growth.[129] The carrier can then attach electronics to subdivide (or "channelize") the available capacity, activating the amount of capacity and number of channels needed along the route. The electronics used to perform this channelization of OCn facilities into DS-1 or DS-3 facilities are relatively inexpensive, are widely available, and can be quickly installed whenever the carrier has demand for DS-1 or DS-3 services. The fact that the capacity of the facility itself is at the OCn level is therefore independent of the carrier's ability to provide a dedicated DS-1 or DS-3 service over that facility.[130]

Given the architecture of the fiber optic network, CLEC claims that there are no competing DS-1 transport facilities are both misleading and inaccurate.[131] While it may be true

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[128] Milner Reply Affidavit, ¶ 3; *see also* Gawlick Declaration, ¶ 4 ("When CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of different capacities").

[129] Milner Reply Affidavit, ¶ 7. The term "OCn" refers to Optical Carrier where "n" designates the optical carrier level. The optical carrier level "n" is directly related to the quantity of DS3 capacity units the system is capable of handling simultaneously. For example, OC48 systems provide capacity for 48 individual DS3 transmission "pipes." *Id.*

[130] Milner Reply Affidavit, ¶¶ 4, 7.

[131] *See, e.g.,* Gawlick Declaration, ¶ 9 (Lightship is "not aware of any alternate providers that offer DS-1 transport in our service areas"); Declaration of Keith Coker on Behalf of NuVox, Inc., ¶ 3 ("Coker Declaration") (noting that while NuVox "frequently receives solicitations from third-party providers to provide transport services," it never receives offers "at the DS1 capacity level" and "currently obtains no DS1 level transport from third-party providers to reach customers").

that no CLEC has built a fiber optic transport system capable of, at most, a single DS-1 transmission path between two points, this fact is irrelevant in assessing whether a CLEC is impaired without access to unbundled interoffice transport. Modern Synchronous Optical Network ("SONET") based fiber optic systems (such as those built by CLECs and other facilities-based service providers) can and do allow the transport of DS-1 "envelopes" within higher speed transmission systems. Thus, when a carrier has the need for several DS-1s between two points, those DS-1s may be multiplexed together onto a DS-3 transmission facility, which may include a self-provided DS-3 transport facility or transport facilities obtained from other carriers.[132]

Whether a CLEC is impaired without access to unbundled DS-1 and DS-3 loops and transport because it may not be economic for the CLEC to provide service only at the DS-1 or DS-3 level asks the wrong question. The critical inquiry is whether a reasonably efficient CLEC is capable of competing without UNEs (i.e., whether "competition is possible"). Thus, the correct question is whether it would be economic for a carrier self deploying high capacity facilities, regardless of capacity, to use those facilities to provide a full range of services, including those at the DS-1 and DS-3 levels. The answer to this question is clearly "yes," which is fatal to the CLECs' impairment claims.

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[132] Milner Reply Affidavit, ¶ 8. NuVox insists that it "currently utilizes third-party providers that have built into NuVox's location and connected to NuVox's switch," but claims that "these providers are not utilized to provide DS1 transport for EELs." Coker Declaration, ¶ 3. Importantly, NuVox does not contend, nor could it, that it is unable to utilize those transport facilities as one component of so-called Enhanced Extended Links ("EELs") if NuVox chose to do so. In fact, the interoffice component of the EEL is typically a high capacity transmission system that has been "channelized" into discrete DS-1 paths, which could readily be multiplexed into multiple DS3 paths. Indeed, even NuVox concedes that individual EEL transport components (that is, multiple DS-1 paths) may be multiplexed onto the "multiple DS3" paths, which NuVox can and does acquire from competitive providers in at least some instances. Milner Reply Affidavit, ¶ 11.

### D. CLEC Evidence of "Impairment" Is Unpersuasive and Their Claims of Competitive Harm If No Impairment Is Found Are Overwrought.

The CLECs go to considerable lengths in an attempt to demonstrate impairment, offering a variety of cost estimates, provisioning interval data, and business case analyses associated with their individual fiber optic deployment. As a threshold matter, as most parties have agreed, the standard for assessing impairment is from the standpoint of a reasonably efficient CLEC. Based on BellSouth's analysis of the costs an efficient CLEC should incur, it is economic for CLECs to self-provide high-capacity facilities in numerous circumstances.[133]

BellSouth's analysis is borne out by the fact that CLEC deployment of high-capacity fiber networks has continued almost unabated since the passage of the 1996 Act. CLECs have built hundred of networks, serving tens of thousands of buildings and hundreds of thousands of customers. This deployment has occurred, despite there being buildings "protected by historic preservation,"[134] "discriminatory municipal franchises,"[135] and cumbersome "legal clearances."[136] This impressive track record of competitive fiber deployment belies any suggestion that CLECs are impaired without ubiquitous access to unbundled high-capacity facilities due to allegedly high construction costs, purportedly lengthy installation delays, rights-of-way issues, and other provisioning problems.

The CLEC Coalition also resorts to scare tactics in making their impairment case, claiming that unbundling relief for DS-1 facilities would cause a 25% increase in prices paid by

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[133] Banerjee Declaration, ¶¶ 81-90.

[134] AT&T Comments at 58.

[135] Declaration of James C. Falvey on Behalf of Xspedius Communications, LLC, ¶ 22 ("Falvey Declaration"), submitted with Comments of The Loop and Transport CLEC Coalition.

[136] Duke Declaration,¶ 10.

small and medium-sized businesses and decrease consumer welfare by $4.9 billion annually.[137] The fallacy of the CLEC Coalition's reasoning is obvious. First, it is not necessarily the case, as the CLEC Coalition assumes, that special access will be used in every instance when a DS-1 UNE is not available. On the contrary, it may be more economic for a carrier to self-provision DS-1 facilities, obtain such facilities from another provider, or use alternative technologies to meet its customer's needs. The CLEC Coalition's analysis does not take into account any of these options in calculating the price purportedly to be paid by businesses if DS-1 unbundling relief were to be granted.

Second, the CLEC Coalition's analysis presupposes that unbundling relief for DS-1 facilities would be obtained everywhere, which is not something BellSouth or the other ILECs are even requesting. Under BellSouth's proposal, the ILECs would be relieved of providing unbundled access to high-capacity loops, transport, and dark fiber only in wire centers with 5,000 or more business lines. BellSouth has 1574 wire centers region wide, only 429 of which have 5,000 or more business lines (27%). This means that in the vast majority of BellSouth wire centers (1145 or 73%), CLECs would continue to be entitled to purchase unbundled high-capacity loops, transport, and dark fiber from BellSouth.[138] The CLEC Coalition's dire economic analysis glosses over this very important fact.

### E. The Commission Must Consider Special Access Services in Analyzing Impairment to High Capacity Facilities.

#### 1. Competition using special access services is extensive.

[137] CLEC Coalition Comments at 10.

[138] Padgett Reply Affidavit, ¶ 57.

The CLECs do not dispute that they are making extensive use of special access service, nor could they. The evidence is overwhelming that CLECs routinely use special access to offer high-capacity services in competition against the ILEC. In fact, CLECs continue to this day to purchase special access services when they could have purchased UNEs instead.[139]

CLEC use of special access is not limited to meeting "temporary" needs or "where no real alternatives exist to permit them to enter into or expand within a local market," as some CLECs suggest.[140] BellSouth has identified 106,640 buildings in its territory in which CLECs are serving end users using DS1 circuits, either purchased as special access services, UNEs, or both. In the majority of these buildings, the CLECs are serving end users *exclusively* via special access. BellSouth also took a sample of 15 buildings in which carriers are using both special access and UNEs to provide service; in five of these buildings, there is at least one CLEC that itself is using both UNE and special access DS1s to serve its end users in the same building. This evidence suggests that, even though UNEs are available, carriers have elected to use special access to meet their customer's needs depending upon the particular situation.[141]

There is no merit to the argument that the only reason CLECs continue to order special access is because BellSouth not been willing to combine UNEs for CLECs or convert them from special access to UNEs. But BellSouth has made available EEL conversions since October 1999 and has provisioned orders for new combinations of UNEs since approximately February 2000.

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[139] *Id.*, ¶ 12

[140] CLEC Coalition Comments at 37-38.

[141] Padgett Reply Affidavit, ¶¶ 6, 72-73. Some carriers claim that commingling and use restrictions may be the reason a carrier elects to use special access instead of UNEs. In the 15 buildings BellSouth examined, in most cases, the carrier had more special access DS1s than UNE DS1s and, in one case, the UNE is a stand-alone DS-1 loop, which is not even subject to the commingling and use restrictions. *Id.*

The examples provided by the CLEC Coalition of carriers that purportedly have experienced trouble converting combinations of elements to UNEs - XO and Xspedius -- do not even involve requests for conversions of EELs, but rather requests for conversions of stand-alone special access services to stand-alone UNEs. Neither carrier has or is apparently even willing to negotiate terms in its interconnection agreement that would allow for such a conversion.[142]

Notwithstanding CLEC arguments to the contrary, the Commission is not at liberty simply to ignore special access in conducting its impairment analysis.[143] To do so would violate the D.C. Circuit's directive that the Commission cannot "omit consideration of [ILEC-provided] alternatives in its impairment analysis" and "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[144] The Court of Appeals could not have been more clear on this point, when it held that "[w]hat the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs."[145]

CLECs seek to make much of the fact that special access service is priced higher than UNEs.[146] However, as the Supreme Court ruled, the Commission cannot find impairment simply because of "any increase in cost (or decrease in quality) imposed by denial of a network element."[147] As the D.C. Circuit noted, there is no "need for the Commission to impose the costs of mandatory unbundling" when "competitors have access to necessary inputs at rates that

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[142] Padgett Reply Affidavit, ¶ 8.

[143] ALTS Comments at 10-13; CLEC Coalition Comments at 37-38.

[144] *USTA II,* 359 F.3d at 577.

[145] *Id.*

[146] *E.g.,* AT&T Comments at 93.

[147] *Iowa Utils. Board,* 525 U.S. at 389-90.

allow competition not only to survive but to flourish." Indeed, in such circumstances "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates."[148]

Some CLECs also seek to sidestep the obvious importance of special access to the Commission's impairment analysis by seizing upon the language in *USTA II* concerning the "risk of ILEC abuses" concerning special access pricing and ease of administration that, according to the D.C. Circuit, "might in principle support a blanket rule treating the availability of ILEC tariffed services as irrelevant to impairment."[149] However, what might work in principle does not work in practice. As explained in greater detail below, the risk of ILEC abuses and administration concerns are overstated and do not justify ignoring the extensive use of special access in assessing impairment.

### 2. Special access services offer reasonable and stable rates.

AT&T alleges that BellSouth's special access services provide "limited rate stability,"[150] suggesting that BellSouth has the ability to raise unilaterally its rates for special access services. AT&T also contrasts special access pricing with rates for UNEs, which, according to AT&T, "provide competitive carriers with the rate stability that they need to make rational entry decisions." Such allegations make no sense given the structure of BellSouth's current special access discount plans.

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[148] *USTA II,* 359 F.3d at 576, 592. AT&T's suggestion that the D.C. Circuit "treated special access as irrelevant to impairment determinations for local services" is frivolous. AT&T Comments at 83. The D.C. Circuit's directive that the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired" applies generally to the Commission's impairment analysis, regardless of the service in question.

[149] *USTA II,* 359 F.3d at 576.

[150] AT&T Comments at 87-88.

BellSouth currently offers three primary plans to special access customers that provide discounts based on the term length commitment of the plan. These three plans are the Area Commitment Plan ("ACP"), the Transport Payment Plan ("TPP"), and the Channel Services Payment Plan ("CSPP"). Together, these three plans, which cover approximately 80% of BellSouth's special access revenues, allow special access customers to enter into multi-year contracts for as long as 72 months in the case of ACP or up to 96 months for TPP and CSPP. Of course, the customer can select the length of contract it desires depending on its needs and can elect discounts under a contract as short as one-year under any of these three plans. Regardless of the contract duration, however, the price of services purchased under the ACP, TPP, or CSPP will not increase as long as the contract is in effect. Thus, BellSouth's special access customers can be assured of enjoying "rate stability" for extended periods of time at the customer's election, notwithstanding AT&T's claims to the contrary.[151]

There is no merit to the CLEC Coalition's insistence that the "most attractive special access pricing ... is unavailable as a practical matter to CLECs that plan to construct their own facilities as conditions permit."[152] The "most attractive special access pricing" currently offered by BellSouth is through its ACP, TPP, and CSPP, which can readily be used by any carrier, including one that intends to construct its own facilities as some point in the future. These discount plans are flexible enough to allow a carrier to select the period of time to which it would like to enter into a contract with BellSouth, which could be tailored to bridge the time when the carrier enters the market and when it has deployed its own facilities. The ACP, TPP, and CSPP

[151] Starcher Reply Affidavit, ¶ 21.

[152] CLEC Coalition Comments at 61.

also give carriers options as to which services to purchase under these discount plans such that self-provisioned facilities could readily be exempted.[153]

### 3. Special access services offer high quality service with performance guarantees.

AT&T makes several very broad claims regarding what it considers to be poor special access performance allegedly received from ILECs. In particular, AT&T alleges that BellSouth: (i) fails to provide firm order confirmations ("FOCs") for special access services on a timely basis, (ii) frequently misses installation commitments; and (iii) takes too long to repair or restore problem or trouble circuits.[154] AT&T is mistaken, and its claims of alleged "poor performance" by BellSouth in providing special access services are belied by BellSouth's performance data.

With respect to returning FOCs for special access services, BellSouth's performance has been outstanding. During the period from May 2002 through August 2004, more than 92 percent of the FOCs from BellSouth to the CLECs/IXCs for DS-1 special access circuits were returned in less than one day. Another 3.3% of the DS-1 ASRs received a FOC in less than 2 days, and an additional 1.4% were returned within a 3 day period. Overall, during this 27-month period, 96% of the FOCs were returned to the CLECs/IXCs within 3 days of receiving the ASRs. This level

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[153] Starcher Reply Affidavit, ¶ 24. Equally without merit is Cbeyond's claim (Batelaan Declaration ¶ 8) that if it "converted every UNE it currently purchases to special access," Cbeyond not would qualify for any "tariffed special access volume discounts." Cbeyond is mistaken. Based on BellSouth's analysis of the products Cbeyond currently purchases as UNEs from BellSouth in the Atlanta LATA, comparing the tariff rate that would apply if these products were purchased as special access service to the reduced rates that would apply if the special access services were purchased under a discounted contract plan, results in approximately $1 million in savings that Cbeyond would enjoy if it purchased special access services under a discounted contract plan as opposed to paying tariffed special access rates. While both the discounted and tariffed special access rates are higher than UNE rates, Cbeyond's suggestion that its only option is to pay tariffed special access rates if UNE high-capacity loops and transport were not available is false. Starcher Reply Affidavit,¶ 28.

[154] AT&T Comments at 110.

of performance establishes that BellSouth does not take weeks or months to provide a response for special access service, as AT&T claims.[155]

As to meeting its installation commitments, from May 2002 through August 2004, BellSouth provisioned over 98% of all DS-1 special access circuits on time. This is a consistent level of excellent performance that belies any suggestion that BellSouth has "compromised" AT&T's ability to serve its customers.[156]

With respect to AT&T's allegations about the allegedly "lengthy" period of "time to repair or restore problem or trouble circuits to normal operating levels ...," BellSouth's Average Repair Interval for special access circuits averaged 3.35 hours during the period from May 2002 through August 2004, with a low of 2 hours and 43 minutes to a high of 3 hours and 40 minutes. The trouble report rate for these special access DS-1 circuits averaged only 2.4% during this 27-month period. This means that over 97% (100% - 2.4% trouble rate) of the DS-1 special access circuits provisioned by BellSouth received trouble free service in an average month during this period. Again, AT&T's claims of "compromised" customer service ring hollow.[157]

In an attempt to support its unfounded accusations that the special access performance it receives from BellSouth is poor, AT&T seeks to compare Special Access service levels to UNE service levels, claiming that UNE provisioning is "well above the level AT&T receives when it buys special access from the RBOCs."[158] However, as stated previously, and reflected in the data provided, BellSouth's performance in special access provisioning has been excellent.

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[155] Varner Reply Affidavit, ¶ 11.

[156] *Id.*, ¶ 12.

[157] *Id.*, ¶ 10.

[158] Declaration of Alan G. Benway, Robert G. Holleron, Jeffrey King, Michael E. Lesher, Michael C. Mullan, and Maureen Swift on Behalf of AT&T Corp., ¶ 52.

Again, from May 2002 through August 2004 over 98% of all DS-1 special access circuits were provisioned on time. Thus, AT&T's reliance upon UNE provisioning to illustrate alleged poor special access performance is misguided, even putting aside the obvious differences between UNEs and special access service.[159]

At the end of the day, AT&T's claims of poor special access performance are belied by available data. These data are reported using the metrics endorsed in the 272 Audit of BellSouth by the Joint Federal/State Oversight Team, which verified that BellSouth is providing service to competitors at parity with the service its provides to itself and its affiliates. That BellSouth is providing parity service to its competitors further undermines AT&T's unfounded allegations of "poor" special access performance.[160]

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[159] Varner Reply Affidavit, ¶ 12. Equally misguided is AT&T's reliance upon a filing made almost three years ago in CC Docket No. 01-321 in which AT&T discussed data from 1998 to 2002 to establish allegedly poor special access performance. Without regard to the accuracy of such data at the time, performance data that is up to six years old is seriously outdated and proves nothing. This is particularly true when more recent data is available which reflects that BellSouth provisioned over 98% of all DS-1 special access orders on time with a 97% trouble free rate for the period from May 2002 through August 2004. Varner Reply Affidavit, ¶ 12.

[160] Varner Reply Affidavit, ¶ 14. Although AT&T devotes considerable attention to the issue of special access performance measures, it misstates or otherwise omits critical facts in the process. For example, AT&T's claim that BellSouth has "refused to negotiate meaningful performance standards or provide meaningful remedies" is untrue. Although this allegation is premised upon a January 22, 2002 filing by Time Warner and XO Communications in CC Docket No. 01-321, as AT&T is well aware, BellSouth subsequently reached agreement with Time Warner on "meaningful performance standards." In fact, in August 2002, BellSouth and Time Warner filed with this Commission a comprehensive, negotiated proposal to resolve other proceedings. Likewise, AT&T's demand for measures that contain "benchmark performance standards ... rather than the application of the 'parity' standard set forth for UNEs under the Act" is not rooted in any rule or law established by Congress or by this Commission. Rather, it is an attempt by AT&T to legislate performance terms for BOCs for the benefit of CLECs, which are more appropriately handled through CLEC and ILEC negotiations. BellSouth has proposed a comprehensive set of special access measures that are reasonable and are based on suitable parity standards, which will enable the Commission to sufficiently and efficiently evaluate BellSouth's special access performance.

AT&T's assertion that BellSouth has been unwilling to include performance standards in its special access tariffs is completely false.[161] BellSouth's tariffs contain specific standards for service interruptions and installation appointments associated with special access and provide for credits when those standards are not met. For example, BellSouth offers a Service Assurance Warranty on specified special access transport services, which entitles customers who may experience "service interruptions" in such services to receive a credit for a percentage of their monthly recurring charges. In addition, BellSouth offers a Service Installation Guarantee, which is a credit provided to a customer in an amount equal to the non-recurring charges associated with that service should BellSouth fail to meet mutually agreed upon access transport service order installation dates. That AT&T has either intentionally or inadvertently overlooked these tariff provisions is difficult to explain.[162]

### 4. Special access pricing and contract terms are not "anticompetitive."

AT&T's complaint that BellSouth's special access tariffs "contain exclusionary 'lock-up" provisions that require a carrier to maintain the vast majority of its traffic" with BellSouth is inaccurate. In fact, the primary special access discount plans that BellSouth currently makes available -- the ACP, TPP, and CSPP – do not require a special access customer to maintain any specific level of traffic on BellSouth's network, let alone the "vast majority" of the CLEC's traffic.[163]

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[161] AT&T Comments at 112.

[162] Starcher Reply Affidavit, ¶ 27.

[163] Starcher Reply Affidavit, ¶¶ 7, 9 11. BellSouth previously offered its Transport Savings Plan ("TSP") and Premium Service Incentive Plan ("PSIP"), which provided special access discounts in exchange for a customer's commitment to purchase specified volumes of services for a specified period of time. AT&T is challenging both TSP and PSIP (File No. E8-04-MD-010) before the Commission. While BellSouth fully believes that the terms and conditions associated

AT&T alleges that BellSouth's special access tariffs contain "poison pills" allegedly "designed to block carriers that subscribe to these tariffed services from using alternatives to compete."[164] Similarly, the CLEC Coalition asserts that BellSouth is "using special access volume and terms [sic] plans as a means to lock facilities-based CLECs out of the market for wholesale services."[165] However, neither AT&T nor the CLEC Coalition bothers to identify any particular provision in ACP, TPP, or CSPP about which they are allegedly concerned. This is not surprising, since customers opting to participate in the ACP, TPP, or CSPP are not required to forego any competitive alternatives as a prerequisite to obtaining the discounts available under those plans.[166]

To the extent AT&T and the CLEC Coalition are suggesting that a multi-year term contract is a "poison pill" or is somehow "anticompetitive," they are seriously mistaken. Term contracts are common in the telecommunications industry and have been a mainstay of competition for decades. In fact, AT&T admits (p. 129) that "[a]n important feature of the enterprise market is that large enterprise customers take service under multi-year term contracts." Thus, there is nothing insidious about multi-year term contracts.

The CLECs dispute the notion that special access should be considered when conducting an impairment analysis by alleging they are vulnerable to anticompetitive pricing practices for

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with these plans were just and reasonable, BellSouth, nonetheless, voluntarily grand-fathered these discount plans, and new special access customers cannot avail themselves of either plan.

[164] AT&T Comments at 113.

[165] CLEC Coalition Comments at 61.

[166] Starcher Reply Affidavit, ¶ 24.

special access and, in particular, to price squeeze.[167] The price squeeze bogey is raised almost routinely by carriers that depend on certain ILEC-supplied wholesale services (such as switched and special access) in an attempt to win pricing concessions from regulators, most commonly to force the price of the wholesale service in question down toward incremental cost. As explained more fully in the Reply Declaration of Dr. Aniruddha Banerjee, such price squeeze claims are faulty because: (1) the wholesale service in question is *not* an "essential facility," which is a prerequisite to any successful price squeeze; and (2) entry barriers to competing in the local market have been lowered, if not eliminated, particularly with the presence of intermodal competition, which renders any attempted price squeeze a useless exercise.

In an attempt to bolster its price squeeze theory, AT&T claims that it "has effectively abandoned providing some types of local private line and Ethernet services," suggesting that special access pricing by BellSouth and the other ILECs are to blame.[168] While BellSouth is not privy to the reasons for AT&T's business decisions, any decision by AT&T to cease offering particular services may have more to do with a change in business strategy than special access pricing. For example, AT&T announced in July 22, 2004, a new strategy that involves "concentrating its growth efforts going forward on business markets and emerging technologies, such as Voice over Internet Protocol (VoIP), that can serve businesses as well as consumers," which, according to AT&T, "plays to AT&T's strength as an innovator in communications and a leader in serving the complex networking and technology needs of businesses." It may very well

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[167] *Id.* at ¶¶ 111-16; Declaration of Lee L. Selwyn on Behalf of AT&T Corp. at 55-85 ("Selwyn Declaration").

[168] AT&T Comments at 98-101.

be that any decision by AT&T to "abandon" private line and Ethernet services is part of this new strategy.[169]

Furthermore, putting aside the reasons for its business decisions, it is unclear specifically what services AT&T claims it is no longer offering, as AT&T continues to make available to its customers both private line and Ethernet services. In fact, in recent months, AT&T has issued a series of news releases proudly announcing customer contracts that include frame relay and private line services. AT&T also recently announced that it was expanding its "global networking capabilities" by doubling its "wired Ethernet" locations, proclaiming itself as "a leader of IP networking solutions." Based on the foregoing announcements, it does not appear that AT&T is telling this Commission and the investing public the same story about its private line and Ethernet business.[170]

Certain CLECs also complain that special access services should not be considered by the Commission in conducting its impairment analysis because, after they were granted pricing flexibility for their interstate special access services, ILECs allegedly have raised their prices for those services and thereby earned very high rates of return. The suggestion is that ILECs have only succeeded at doing so because they possess sufficient market power in special access services and that elimination of UNEs would create an untenable situation with hapless CLECs at the mercy of those ILECs. Such charges are impossible to take seriously.

First, despite the allegedly rising special access prices, special access services are used by CLECs on a widespread basis in local exchange markets, sometimes to serve customer locations in combination with UNEs and, at other times, to do so without any accompanying UNEs

[169] Starcher Reply Affidavit, ¶ 29; Exhibit NS-1.

[170] Starcher Reply Affidavit, ¶ 30.

whatsoever. It is difficult to believe that CLECs are impaired without access to UNEs when they can and do use special access in lieu of UNEs to carry or deliver local exchange traffic and do so without any evidence of economic loss.[171]

Second, the astonishing claim that ILECs are earning very high (and, by implication, undeserved) rates of return on special access services is essentially meaningless from an economic standpoint. This claim relies on measures of fully allocated book costs of services that are produced using substantial shared and common assets, thus entailing a very high proportion of fixed and common costs and significant economies of scope. It makes no economic sense at all to equate ARMIS regulated rates of return for special access with economic profits. In fact, the tendency of Dr. Selwyn, in particular, to use regulated rates of return repeatedly like a cudgel has been noted and criticized before. For example, Alfred Kahn and William Taylor stated two years ago:

> High or increasing rates of return calculated using regulatory cost assignments for interstate special access services do not in themselves indicate excessive economic earnings reflecting the exercise of market power. Indeed, regulatory rates of return for geographic subsets of single services in multi-product, multi-geographic firms bear no relationship with economic profits and thus can serve no useful purpose in determining whether pricing flexibility has or has not been excessively permissive. ILECs are integrated multi-regional firms and rely on an integrated regional management structure employing the regional physical and human resources to provide a multiplicity of services. The cost allocations required render such a calculation meaningless.[172]

Professor Kahn and Dr. Taylor went on to note that noted economists for AT&T (the same company represented here by Dr. Selwyn and in part by Mayo et al.) decried the use of rates of

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[171] Banerjee Reply Declaration ¶ 64.

[172] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Declaration of Alfred E. Kahn and William E. Taylor on Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc., and Verizon, at 7 (filed Dec. 2, 2002).

return based on accounting allocated costs as "economically irrational" when they appeared before Massachusetts regulators in 1992 to request relief from rate of return regulation for AT&T's intrastate services. Those economists noted, as did Professor Kahn and Dr. Taylor, that allocations of non-incremental costs among services (or categories like regulated and unregulated, interstate and intrastate) may be an expedient for calculating accounting rates of return but, not being cost-causative, those allocations do not lead to any measure of economic profits.[173]

## VII. ENTRANCE FACILITIES AND ENHANCED EXTENDED LOOPS

### A. The Commission Should Not Require Unbundled Access to Entrance Facilities.

There is no merit to the CLECs' claim that the Commission held "that entrance facilities are not facilities or that they are not used to provide a telecommunications service."[174] The footnote in the *Triennial Review Order* cited by the D.C. Circuit does not announce that no impairment analysis was being conducted for entrance facilities because they are not section 153(29)-network elements ineligible for section 251(c)(3) unbundling. Rather, the footnote elaborates on the discussion in the *Triennial Review Order* concerning the economic distinctions between inter-network transmission facilities used for backhaul (entrance facilities) and intra-incumbent LEC transmission facilities used for transport.[175]

The Commission squarely determined that a "more reasonable approach" that was "most consistent with the goals of § 251" includes "only those transmission facilities *within* an ILEC's

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[173] Banarjee Reply Affidavit ¶ 65.

[174] ATX/Blackfoot, *et al.* Comments at 47. *See* AT&T Comments at 51 (arguing that entrance facilities are "network elements" under § 153(29)).

[175] *Triennial Review Order,* 18 FCC Rcd at 17009, n. 119, *cited in USTA II, id.*

network."[176] This conclusion was based, not on the definition of a "network element" in section 153(29), but rather on the eminently reasonable conclusion that Congress, in section 251(c)(3), intended to make only those section 153(29) "network elements" that resided within an ILEC's own telecommunications network available for access on an unbundled basis, although ILECs remain obligated to provide any such network elements needed for interconnection under section 251(c)(2).[177]

In addition to the economic distinctions between "entrance facility" network elements and "inter-network backhaul transmission facility "networks"[178] there is the critical distinction of "inherency" – loop network elements connect to end-users, and without them, an ILEC network would serve no purpose. In contrast, entrance facility network elements are not an inherent part of an ILEC network because they connect to competitors, rather than end-users.[179] Because entrance facilities may be required for interconnection purposes, and Congress explicitly enacted provisions that govern carrier obligations to provide interconnection in § 251(c)(2), it was altogether reasonable for the Commission to exclude these network elements from a definition of ILEC dedicated transport intended for unbundled access under § 251(c)(3).

The D.C. Circuit itself acknowledged that entrance facilities were unsuited for compelled unbundling by openly questioning why ILECs, and not CLECs, tend to construct entrance facilities, by noting that entrance facilities exist exclusively for a CLEC's convenience and observing that it is anomalous that CLECs do not provide entrance facilities when they could do

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[176] *Triennial Review Order*, 18 FCC Rcd at 17203, ¶ 366; *USTA II,* 359 F.3d at 585.

[177] *Id.*

[178] BellSouth Comments at 51, 53-55; *see also* SBC Comments at 70; *and* Verizon Comments at 66, 80-81.

[179] Brief for Respondents, No. 00-1012, *USTA, et al. v. FCC* at 81, n.35. (Dec. 31, 2003).

so, presumably, at costs associated with "the most efficient telecommunications technology currently available, . . . i.e., the TELRIC standard."[180] No commenter advocating the compelled unbundling of entrance facilities has overcome these concerns with a persuasive case for impairment for entrance facilities.

In the first place, the Commission should reject attempts to redefine its definition of entrance facilities as loops, or in such an open-ended fashion so as to make entrance facilities available as UNEs on an unrestricted basis to decidedly unimpaired broadband, wireless, and long distance interconnecting carriers without restriction.[181] There is no evidence in the record to support such a definitional change, or such unrestricted use, on remand. The D.C. Circuit upheld the Commission's decisions not to compel unbundled access to broadband elements as reasonable, "even in the face of some CLEC impairment" in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition ensures the persistence of substantial competition in broadband.[182] The D.C. Circuit explicitly found that existing rates outside the compulsion of section 251(c)(3) do not impede wireless competition or pose a barrier to wireless carriers that makes entry uneconomic,[183] and, in the context of long distance service, made clear that the same facts and rationale apply.[184] To expand the current

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[180] *USTA II,* 359 F.3d at 586.

[181] ATX/Blackfoot, *et al.* Comments at 49 (redefining entrance facilities without any limitations on interconnection carrier's end in order to accommodate packetized data carriers), T-Mobile Comments at 9-10 (redefining element as part of loop or sub-loop definition), AT&T Comments at 52 (not advocating change to definition, but advocating unbundled access to entrance facilities "free of use restrictions"), Sprint Comments at 56-59 (not advocating change to definition, but arguing "reversal" of exclusion of entrance facilities so that they can be made available to wireless carriers).

[182] *USTA II,* 359 F.3d at 585.

[183] *Id.* at 575-76.

[184] *Id.* at 592-93 (on the issue of impairment, the Commission "may well find none with reference to long distance service").

definition of entrance facilities, or to "reverse the exclusion" of entrance facilities from the definition of dedicated transport and in turn allow unrestricted unbundled access to these facilities under section 251(c)(3) to broadband, wireless and long distance providers alike would flout these rulings.

In any event, commenters advocating entrance facility impairment are wrong. CLECs concede that new entrants have the "stronger desire" to connect to the ILEC network and that the "principle of network effects" provides ILECs with "an incentive to permit such connections."[185] These market conditions destroy any case for compelled unbundling – CLECs and ILECs alike, though competitors, have market incentives to interconnect their respective networks through arms-length commercial transactions. Moreover, as explained by the Commission, all LECs have the duty to interconnect with each other on a just and reasonable, nondiscriminatory basis regardless of the status of unbundled access to ILEC entrance facilities.[186]

Wireline commenters argue that the impairment analysis with respect to entrance facilities should be the same as that for high capacity loop and transport facilities.[187] These arguments fail in two critical ways. First, they do not refute in any substantive way the unique economic characteristics that distinguish entrance facilities from dedicated transport that the Commission identified in the *Triennial Review Order*, which were acknowledged by the D.C. Circuit and which are confirmed in the record.[188] Neither CLEC nor ILEC has first-mover or

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[185] ATX/Blackfoot, *et al.* Comments at 48.

[186] *See Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 366.

[187] ATX, *et al.* Comments at 49-50, AT&T Comments at 52 ("the impairment analysis is exactly the same as that for dedicated transport").

[188] *See Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 367 (discussion of different economics of dedicated facilities used for backhaul between networks and transport within an incumbent network, concluding that analysis of role of entrance facilities within definition of dedicated transport must reflect this distinction); *USTA II*, 359 F.3d at 586; BellSouth Comments

sunk-cost advantage.[189] Indeed, AT&T appears to agree that entrance facilities are "the most competitive type of transport" and that their competitive deployment is "pervasive,"[190] stating for AT&T "almost all competitively deployed transport links *are* entrance facilities." [191]

This admission of AT&T's ability to deploy entrance facilities in competition with other carriers demonstrates the second reason why wireline commenters cannot demonstrate impairment. The record, as shown above, reflects a significant lack of impairment with respect to high-capacity loop and transport facilities. For commenters contending that the same impairment analysis should apply, they cannot be impaired for the *most* competitive form of ILEC transport elements, when they are not impaired without unbundled access to the (allegedly) *least* competitive forms. And where, as here, AT&T concedes that all of the competitive transport that it deploys are entrance facilities, it can simply make no argument that it is impaired in its ability to access ILEC entrance facilities. Moreover, AT&T's 12 DS3 economic "threshold" for self-deployment cannot stand in the light of the availability of ILEC special access services and other competitive alternatives outlined in the record of this proceeding. [192] Using these competitive alternatives, AT&T can "bridge" the interval until it believes, in its own business judgment, that self-provisioning entrance facilities is more economical than leasing them from third parties.

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at 53-55, Padgett Affidavit, ¶¶ 37-39 (BellSouth designs, engineers, constructs and deploys the facility to order of requesting carrier; newly constructed facility is dedicated to the use of the ordering carrier and is not used by BellSouth to serve its own end users; connecting carriers are migrating to self provisioned entranced facilities). *See also* Verizon Comments at 80-81, *esp.* Patil Declaration, ¶¶ 6, 9, 16 (similar trends documented in other ILEC serving territories).

[189] Padgett Reply Affidavit, ¶85.

[190] *UNE Fact Report 2004* at Section III, E, 1, a.

[191] AT&T Comments at 52.

[192] BellSouth Comments at 55-57.

Wireless carriers such as Sprint and T-Mobile have not provided any evidence to overcome the strong presumption of wireless non-impairment that permeates *USTA II.* Vaguely complaining of unspecified levels of expenditures, the wireless carriers continue to complain, not about "uneconomic entry," but rather about their ability to make more profits. All of these arguments have been thoroughly refuted.[193]

Wireless commenters do not overcome the compelling record evidence, or the judgment of the D.C. Circuit, that with respect to the wireless market, "evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition."[194] Sprint simply asserts, without support or context, "the single largest network operating cost of Sprint's mobile wireless division is the purchase of dedicated transport facilities."[195] This assertion alone is not enough to establish impairment, especially in light of Sprint's most recent annual report, in which it asserts, "[t]he market for wireless services is highly competitive."[196]

In describing its PCS Division's costs of services and products, Sprint states that theses costs "mainly include handset and accessory costs, switch and cell site expenses, customer

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[193] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, *Public Notice*, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003). BellSouth Comments at 63-66, BellSouth App. Tab 32 (Reply Declaration by National Economic Research Associates, Inc., "Claim: CMRS Providers are Impaired Without the Availability of Dedicated Transport on a UNE Basis" (July 17, 2002) ("NERA 2002 CMRS Impairment Analysis")); SBC Comments at 22-24 ("As the D.C. Circuit has recognized, the overwhelming evidence of remarkable growth and robust competition in the wireless industry without access to UNEs demonstrates that there is no lawful basis to find impairment or impose unbundling in that market); Verizon Comments at 71-74. *UNE Fact Report 2004* § II.B.1.

[194] *USTA II*, 359 F.3d at 576. AT&T grudgingly acknowledges, "CMRS competition might be flourishing even though CMRS carriers typically use special access as an input to their *wireless* service" AT&T Comments at 124 (emphasis in original).

[195] Sprint Comments at 55.

[196] Sprint Corporation Form 10-K, "Sprint PCS Group, General Overview of the Sprint PCS Group, Competition" at 6 (Dec. 31, 2003) available online at <www.sprint.com/sprint/ir/annual>

service costs and other network-related costs."[197] Sprint goes on to single out "handset and equipment costs" as comprising 39 percent of total costs of services and products, but nowhere in its comments does Sprint provide any information about its "dedicated transport costs" in relation to its overall $ 6.15 billion worth of service and product cost operating expenses, or its ability to afford $ 2.15 billion in capital expenditures for 2003.[198] The Commission is in no position to find that Sprint is impaired without access to ILEC entrance facilities, or any other kind of UNE, on the record presented.[199]

T-Mobile fares no better. As the Reply Declaration of Dr. Banerjee demonstrates, T-Mobile has not properly characterized the market and ignores substantial and convincing evidence of meaningful product substitution, which has occurred without wireless carrier's access to UNEs.[200] Nor are T-Mobile's attempts to characterize "wireless only" UNEs convincing.[201] BellSouth has thoroughly refuted these arguments.[202] T-Mobile has added

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[197] *Id.* at 39.

[198] *Id.* at 37. It is telling that in the Sprint 10K discussions on "Legislative and Regulatory Developments," Sprint is silent as to this proceeding, *USTA II*, or any specific impairments with respect to its access to ILEC dedicated transport UNEs as it relates for its wireless operations. *Id.* at 9. *See also* NERA 2002 CMRS Impairment Analysis, BellSouth Comments, and Tab 32 at 126-28 for a discussion on how important the overall financial context is to assessing claims of impairment with respect to even quantified dedicated transport expenses.

[199] *See* NERA 2002 CMRS Impairment Analysis, BellSouth Comments, Tab 32 at 126-28 for a discussion on how important the overall financial context is to assessing claims of impairment with respect to even quantified dedicated transport expenses.

[200] Banerjee Reply Declaration, ¶¶ 98-104.

[201] T-Mobile wrongly characterizes transport elements as loops for the reasons set forth in the record incorporated into this proceeding through the wireless petition. Base stations are simply not end-user customer premises. If they were, then there would be no further telecommunications services provided beyond that point, and CMRS providers would not be eligible for UNEs because they would not be providing telecommunications services. Further, in BellSouth's region, many multiple PCS providers attach to a single cell tower, and in turn serve multiple end users; T-Mobile's characterization of these facilities as a kind of lonely lighthouse is simply wrong. Moreover, especially for roof-top facilities, facilities based competitive providers, such as cable companies, can just as easily serve CMRS providers through competitive fiber-optics alongside ILEC facilities.

nothing new in its evidentiary case, and as Dr. Banerjee demonstrates, they have utterly failed to prove impairment.[203]

### B. The Commission Should Strictly Limit Access to EELS.

The record in this proceeding demonstrates that carriers are not universally impaired without unbundled access to high-capacity loops, transport, or dark fiber. In markets where there is no impairment, ILECs no longer have an obligation to make available unbundled EELs.

However, even when made available, EELs are especially susceptible to gaming and arbitrage. Under the *Triennial Review Order*, EELs obtained at TELRIC rates ostensibly to provide local wireline service could be used to provide service in markets where competition thrives and where there is no impairment, such as the wireless and long distance markets.[204] As the D.C. Circuit observed in *USTA II*, "IXC providers have traditionally purchased these services from ILECs for long distance purposes as a special access service, i.e., under the ILEC's tariff rather than at TELRIC rates."[205]

The record bears this out.[206] In BellSouth's region, nearly 87 percent of all DS1 loop/transport combinations are purchased as special access, while over 99 percent of all DS3 loop/transport combinations are purchased as special access.[207] Special access circuits are being

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[202] BellSouth Nov. 6, 2003 Opposition and Comments at 16-17, n.53; BellSouth Nov. 17, 2003 Response to Comments Supporting Wireless Petitions for Reconsideration at n.7 and accompanying text.

[203] Banerjee Reply Declaration, § IV.

[204] *Id.* (EELS can also be used to "originate and terminate long distance calls.").

[205] *Id.*

[206] Verizon Comments at 75-76; SBC Comments at 93-94.

[207] Padgett Reply Affidavit, ¶ 87. When BellSouth's three largest IXC customers are taken out of the count, the percentages change to 68% of all DS1 loop/transport combinations and 98% of

purchased at wholesale and are being used successfully to provide local service even when UNE alternatives are available at lower cost. [208]

Thus, the record demonstrates that carriers have been using special access circuits to successfully provide service in both local and long distance markets, belying any claim that they are impaired in general in any market without access to EELs. Given a choice at the outset of purchasing UNEs or special access, many carriers choose special access over UNEs for their own business reasons, and many have decided not to convert their special access circuits to UNEs, further undermining any case for impairment.[209]

To comply with *USTA II,* the Commission must therefore ensure that high capacity loop and transport UNE combinations are confined to markets where impairment exists. SBC correctly states that the D.C. Circuit, in exercising its deference to the Commission's decision with respect to its newly enacted eligibility criteria, "in no way foreclosed the Commission from revisiting those criteria and, if necessary, improving upon them."[210] In fact, the Court stressed that the new "safeguards" are "imperfect."[211] As the record reflects, under the Commission's new criteria, a facility can be used predominantly if not exclusively to provide long-distance service.[212] The Commission must at a minimum ensure that UNEs in general, and EELs in

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all DS3 loop/transport combinations. BellSouth's three largest IXC customers purchase 99% of their DS1 loop and transport combinations and 99% of their DS3 loop and transport combinations as special access circuits. *Id.*

[208] Padgett Affidavit, ¶ 39 (filed with BellSouth's Initial Comments).

[210] SBC Comments at 95.

[211] *Id.*

[212] *Id.* at 96-97 (demonstrating how only one of the several criteria adopted purports to actually address how a CLEC actually uses EELs, and this requirement, that each DS1 EEL be associated with a single interconnection trunk, is twice flawed, permitting both a majority of the traffic over the facility to be non-local, or Internet access or data traffic).

particular, are not used to provide long distance, wireless or other services for which there is no impairment. In order to do this, especially under the timeframes under which the Commission is operating, the Commission must re-establish the usage criteria, safe harbors and commingling restrictions it previously adopted in its *Supplemental Order Clarification.* [213]

BellSouth stresses that there is no need to depart from the rules established by the Commission prior to the *Triennial Review Order*. Even as the D.C. Circuit has continued to find fault with the Commission's fundamental unbundling analysis following the Supreme Court's original vacatur, it has continued to endorse the central principles affirmed by the *CompTel* court. Although a number of parties propose various modifications to the Commission's newest EELs eligibility criteria, there is no question that, as a matter of law, the prior restrictions are lawful and are far less susceptible to gaming or arbitrage than the new criteria or to any alternative proposed by commenting parties.[214] In BellSouth's experience, concerns about ILEC abuse of the auditing requirements were far overstated; individual complaints have always been subject to complaint resolution procedures and CLEC objections to audits are not always well taken. It would be best to restore the former eligibility criteria and rely on existing enforcement mechanisms to ensure carrier compliance.[215]

Finally, it is important that the pre-existing criteria, which were designed to address traditional, narrowband networks, be supplemented in order to address the issues posed by non-traditional networks. In order for next generation integrated packet services to be provisioned over UNEs, the requesting carrier must demonstrate that at least 50% of the circuit's bandwidth

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[213] Padgett Reply Affidavit, ¶¶ 86-91.

[214] Padgett Reply Affidavit, ¶¶ 92-93.

[215] *Id.*, ¶ 93.

is used and continuously available for dialing and conducting simultaneous local voice telephone calls. In order to demonstrate eligibility there must be a sufficient number of working local telephone numbers assigned to the circuit in order to allow this, with porting capability, 911 capacity, and the circuit must connect to a class 5 switch or its equivalent. Only non-channelized DS-1 circuits ordered after the effective date of any rules adopted in this proceeding should be eligible for provisioning over UNEs in this way. Loops must terminate into a collocation arrangement or be connected to a UNE transport facility, while UNE interoffice transport facilities being used in a packet network must have both ends terminating into a collocation arrangement in order to be a part of a valid UNE combination.

## VIII. INTERPLAY BETWEEN SECTION 251 AND SECTION 271

### A. Where the Commission Makes a Determination of No Impairment Under Section 251, State Commissions Cannot Impose an Unbundling Obligation Under Section 271 or Under State Law.

A number of commenters continue to argue that, even if the Commission determines that carriers are no longer impaired without access to ILEC unbundled network element under section 251, states can nevertheless require the ILECs to unbundle these same (or similar) elements under state law or under section 271 of the Act. As the Commission itself as stated, its unbundling decisions "reflect[] a 'balance' struck by the agency between the costs and benefits of unbundling an [an] element. *Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.*[216] Thus, no legal basis exists for a state to impose unbundling obligations under color of any state or federal law once the Commission has determined that unbundling is not required.

[216] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) (FCC *USTA II* Br."), quoted in SBC Comments at 114 (emphasis added).

Thus, the interplay between section 251 and section 271 is relatively straightforward. As long as the Commission lawfully determines that there is impairment with respect to ILEC network elements, the ILEC is required to provide unbundled access to those elements consistent with the Commission's unbundling rules. The availability of these section 251 elements may in turn, as the Commission has found, satisfy any independent obligation to provide elements separately identified in section 271.[217] To the extent that an independent basis in state law exists that purports to authorize state commissions to regulate the rates, terms and conditions of unbundled access to ILEC network elements, this state authority is both concurrent and coextensive with valid Commission unbundling requirements for elements for which the Commission has made an affirmative finding of impairment under section 251. But in no event do the states have authority under state or federal law to mandate unbundling when the Commission has found no impairment.

Some commenting parties attempt to bootstrap section 271 to section 252 in a way that would attempt to establish derivative state authority to compel unbundling under section 271 even where the Commission has found no impairment. Such attempts are misguided.[218] Moreover, the cases cited by AT&T for state's general rulemaking authority for section 271 elements all dealt with "checklist item two" UNEs that are in fact 251 UNEs incorporated by

[217] With respect to forbearance from the imposition of unbundling under section 271 for facilities as to which the Commission has not found impairment, including broadband facilities, BellSouth agrees with SBC's analysis, SBC Comments at 109-118, and the analysis contained in the various BOC petitions on this issue. SBC Comments at n. 322.

[218] *Cf.* AT&T Comments at 175-82, Momentum Comments at 15-18, *with* BellSouth Comments at 70-81, SBC Comments at 113-18, Verizon Comments at 120-28. Qwest does not address the legal arguments demonstrating this, but makes clear that only the Commission has authority under § 271 to regulate the rates, terms and conditions of elements that may be independently required under § 271. Qwest Comments at 92-101.

reference into 271, and do not apply to "independent" checklist items 4-6 and 10.[219] AT&T's reliance on *Coserve* is equally misplaced, and its statement that the Fifth Circuit "reversed a state commission's reasoning" is intentionally misleading.[220] *Coserve* holds that: (1) a state commission's section 252 jurisdiction is limited by the actions of the parties in conducting voluntary negotiations; (2) a state commission may only arbitrate issues that were the subject of voluntary negotiations, and (3) its holding neither eliminated an ILECs section 252 duty to negotiate nor "create[s] any new obligations under the Telecom Act."[221] Far from reversing any holding or reasoning, the Court of Appeals *affirmed* the district's court's decision *not to reverse* a state commission because the commission's "ultimate refusal to arbitrate... was correct," since the issue in dispute "was not a mutually agreed upon subject of voluntary negotiation" between the CLEC and ILEC in the first place.[222]

AT&T states that under section 271, "[t]he Commission's federal interest is to ensure that state commission-set rates for checklist items are not too high, but there is absolutely no § 271 basis for a federal concern that these rates are too low." [223] AT&T's new view of the 1996 Act is plainly incorrect and at odds with its own earlier positions. The 1996 Act is not analogous to

[219] AT&T Comments at 175-77, *citing WorldCom v. FCC, AT&T v. FCC and Sprint v. FCC.*

[220] AT&T Comments at 179.

[221] Verizon Comments at 488.

[222] *Id.* *Coserv* does not hold that jurisdiction is established under section 271 for states to maintain unbundling requirements that have been eliminated by this Commission, or that this Commission has refused to promulgate under section 251, or that state commissions have independent jurisdiction over the prices and terms of non-checklist item two elements and services. *Coserve* stands for the unremarkable proposition that any party may, at the outset, voluntarily consent to negotiate over issues, and by doing so consent to subsequent compulsory arbitration in the event no agreement is reached on the issues on which they agreed to negotiate. But a parties' potential ability to consent to jurisdiction to a state regulatory over a wide range of topics does not confer independent legal jurisdiction upon a state regulatory commission to set prices, terms and conditions generally for matters that Congress has given exclusive jurisdiction to this Commission.

[223] AT&T Comments at 175.

federal health and welfare regulation, like the Clean Air or Clean Water Acts, where Congress establishes minimum requirements for national health and safety, such as permissible levels of air emissions or water pollutants, which states may be permitted to exceed by establishing more rigorous requirements.

The role of state commissions is "carefully delineate[d]" and does not, as the D.C. Circuit has found, include imposing unbundling obligations when the Commission has found that CLECs are not impaired without such unbundled access.[224] Furthermore, the Commission's rules have been vacated as overbroad three times because of the social costs of maximum, unprincipled network unbundling. Allowing states to adopt unbundling policies that are more rigorous than a "minimum" federal floor is precisely backwards; it would undo the "'balance' struck" by this Commission "between the costs and benefits of unbundling an [an] element."[225]

Therefore, whatever the Commission may establish under section 251 is the maximum amount of unbundling permitted by law, not the minimum. State unbundling policies that are inimical to those established by this Commission in conformance with the guidelines articulated by the federal courts are like the standard-less sub-delegation federal responsibilities with respect to section 251 impairment determinations that the D.C. Circuit found unlawful.[226] They would clearly strike a "different balance" than that struck by this Commission, would "conflict with federal law" and "thereby warrant[] preemption."[227]

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[224] Verizon Comments at 116, *quoting USTA II*, 359 F.3d at 568 and citing to *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195.

[225] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) ("FCC *USTA II* Br."), quoted in SBC Comments at 114.

[226] *USTA II,* 359 F.3d at 568. Neither the FCC nor the U.S. sought certiorari on this or any point.

[227] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) (FCC *USTA II* Br."), quoted in SBC Comments at 114. The Commission should therefore grant BellSouth's pending Petition for Declaratory Ruling

Indeed, AT&T has advocated precisely this position, which ultimately was adopted by the Supreme Court. As AT&T wrote in its initial comments in the antecedent docket:

> The 1996 Act was enacted against the background of the settled rule that federal agency regulations will preempt any inconsistent state policies unless the federal statute provides otherwise.
>
> Accordingly, any Commission regulation that reasonably implements the standards of Section 251 (and that is not waived by the Commission, see infra), will itself preclude the operation of inconsistent state regulations. . . .
>
> . . .
>
> More fundamentally, if the determinations of the minimum requirements of section 251 were initially to be made in 50 different states and the District of Columbia, it would recreate the balkanization, delays, and incessant litigation that the Act was intended to end . . . .[228]

AT&T was even more emphatic in its Reply Comments:

> The express terms of §§ 251, 252, and 253 render irrelevant statements about preemption of state law being "disfavored" and eliminate any need to consider whether preemption should be "implied." Congress has exercised its authority under the Commerce Clause of the Constitution in the most direct and unequivocal terms by imposing explicit federal duties on ILECs and by mandating that states enforce those federal requirements.[229]

On appeal, the Supreme Court agreed with AT&T:

> But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal agency regulations. If there is

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(Tennessee preemption petition). BellSouth also agrees with Verizon that the Commission should establish a procedure that ensures the prompt preemption of any state commission order, whenever issue, that purports to impose such inconsistent obligations. Verizon Comments at 119 (advocating that complaints be decided within same 90-day period that applies to complaints that a BOC is not in compliance with § 271, and imposing burden of proof in such proceeding on the parties advocating such state requirements)

[228] Comments of AT&T Corp., CC Docket No. 96-98, at 4-6, 8 (filed May 16, 1996) (§ 2(b) of the Act has no relevance to the Commission's authority to promulgate the rules that would best implement the Act's local competition provisions, and that the subsequently enacted § 251 impliedly repeals § 2(b)).

[229] Reply Comments of AT&T Corp., CC Docket No. 96-98, at 2-3 (filed May 30, 1996).

> any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.[230]

The arguments that AT&T espoused eight years ago apply with the same force of law and logic. After three vacaturs, it is clear that this Commission must determine which network elements should be unbundled, not a state commission. As AT&T argued in 1996, all of the provisions of the 1996 Act that preserve state commission authority make clear that state commissions have no retained authority to take actions that conflict with the requirements of the 1996 Act or the Commission's regulations, or that substantially prevent the implementation of the Act and those rules.[231] When the Commission has either found no impairment "or otherwise declined to require unbundling on a national basis" with respect to a particular network element, states are barred from directing that the network element be unbundled because to do so would "conflict with … implementation of the federal regime."[232]

### B. Section 251 Requirements Do Not Apply to Section 271 Elements.

Neither states, nor the Commission, should allow commingling of section 271 elements with any other elements, nor apply the pricing standards of section 251 to section 271. As Qwest notes, *USTA II* upholds the Commission's conclusion that BOCs are not obligated to combine elements provided pursuant to section 271 with other elements unbundled under section 271 or section 251.[233] As Qwest notes, carriers operating under the less regulatory obligations of

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[230] *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[231] *Id.* at 117, citing *Triennial Review Order*, 18 FCC Rcd at 17099, 17100-01, ¶¶ 192, 194.

[232] *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195. *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004), and various state commission findings that "no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under §251(d)(2). Verizon Comments at 117-18, n.124.

[233] Qwest Comments at 98.

section 271 are able to structure offerings, including platform offerings through contract tariffs. Unreasonable discrimination in the provision of these market-based offerings is afforded both through market forces themselves, as well as the general nondiscrimination standard set forth in section 202 of the Act.[234]

Nor are commercial agreements that do not relate to unbundling obligations under section 251 subject to the filing, arbitration, review and approval and opt-in requirements of section 251.[235] Because any obligation to provide the specific items identified in checklist items 4-6 and 10 arises out of section 271 and not section 251, it is an independent obligation "divorced" from section 251 and the Commission has sole jurisdiction over contracts for these elements. And where an ILEC elects, for business reasons, to negotiate over or agree to provide network elements that are not mandated by either section 251 or section 271, agreements covering these elements are not subject to state filing, arbitration or approval.[236] Accordingly, the Commission should grant BellSouth's Emergency Petition for Declaratory Ruling and its accompanying Petition for Forbearance for the reasons stated herein and in those petitions.[237]

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[234] *Id.* at 98-99

[235] Qwest Comments at 92-97; SBC Comments at 123-29; Verizon Comments at 138-41.

[236] Qwest Comments at 93-94.

[237] BellSouth Emergency Petition for Declaratory Ruling (filed May 27, 2004) (requesting the Commission to declare that separate agreements for the provision of services not required under § 251 are not subject to section 252; that such agreements are federal agreements that require compliance with section 211 of the Act and § 43.51(c) of the Commission's rules; and that inconsistent state actions are preempted); BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004) (providing an additional basis for the Commission to exempt Non-251 Agreements from the requirements of § 252, in the event that the Commission grants the Emergency Petition for Declaratory Ruling but that decision is vacated upon review or the Commission does not agree with the legal analysis in the Emergency Petition but concurs with BellSouth that the underlying relief sought is vitally important).

## VIII. TRANSITION ISSUES

BellSouth agrees with those commenters that insist that after eight years of unlawful unbundling it is important to adopt procedures that will facilitate a rapid and rational transition away from the maximum unbundling regime that has been repudiated by the courts. BellSouth does not oppose the transition proposal advocated by Qwest.[238] However, as a practical matter, and given the Commission's commitment to establish permanent rules prior to the end of December 2004, BellSouth also does not oppose the time-table established in the *Interim Order* as the outer limits for any transition to a new lawful unbundling regime adopted by this Commission. The Commission should reject any attempts to extend this transition by "slow-rolling" the implementation of the new rules.[239]

AT&T's argument that the Commission cannot order the elimination of access to particular UNEs by a particular date without overriding valid change of law provisions is groundless. The basis of AT&T's argument is that states "retain the authority to determine whether access to network elements should be required under state law (or other provisions of federal law)," which, as demonstrated above, is false.[240]

Because the agency's unbundling rules never complied with the law in the first instance, the Commission is following the law as it already and always existed when it adopts lawful unbundling rules; in doing so, the Commission can certainly correct its prior unlawful findings without necessitating a lengthy renegotiation process.[241] Thus, CLECs may not use "change of

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[238] Qwest Comments at 89-92.

[239] SBC Comments at 118-20.

[240] AT&T Comments at 200.

[241] Verizon Comments at 133.

law" provisions in their existing interconnection agreements to delay the implementation of the new rules.

In the course of its arguments for a prolonged transition period AT&T asserts that BellSouth's EELs waiver request is no longer necessary and seeks the immediate right to convert special access circuits to EELs. BellSouth's petition, of course, was designed precisely to prevent the premature conversion of special access circuits to EELs; the danger that existed at the time of the petition was that carriers would convert special access circuits to EELs before a state commission's determination of whether impairment existed for the component loop and transport elements comprising the EEL. This "unbundle first, find impairment later" approach was then, and remains now, unlawful.

With the finality of *USTA II*, and the record so clear on lack of impairment, particularly with carriers' use of special access, the Commission can and should prohibit special access conversions to EELs. When impairment has been found to the extent that EELs are made available as UNEs in the Commission's final unbundling rules, carriers may elect between EELs or special access alternatives (or other alternatives) for new circuits only, and subject to meaningful use restrictions. In no event should EELs be made available to carriers, or to carrier's customers for the use in the long distance, wireless, or competitive access markets.

In sum, for the reasons set forth in the comments, the Commission should reject AT&T and other attempts to create multi-year transitions, to invoke change-of-law provisions to slow down implementation of the Commission's new rules, and to permit any special access to UNE conversions.[242] The Commission should instead adopt rules requiring parties to move quickly to new arrangements incorporating new rules established in this proceeding on a time-table no later

[242] SBC Comments at 118-23, Verizon Comments at 128-38.

than that established in the Interim Order. CLECs have already benefited from a prolonged (exceeding five years) transition period dating from the first vacature of the Commission's unbundling rules in 1999. It is time to stop the market-distorting effects of maximum unbundling.

## IX. OTHER ISSUES

### A. There is No Basis for Re-implementing Line Sharing.

#### 1. CLECs Are Not Impaired Without Access To Line Sharing.

Not only is there absolutely no justifiable policy reason for reinstating line sharing as a UNE, the Commission is legally barred from doing so. As BellSouth pointed out in its comments, line sharing was vacated by the D.C. Circuit in *USTA I*, a holding that the court reiterated in *USTA II*, and was repudiated by the Commission in the *Triennial Review Order*.[243] Thus, the Commission could not lawfully reinstate line sharing, even if it were so inclined.[244]

However, several commenters distort the facts and market realities in an attempt to revisit the line sharing issue.[245] Accordingly, BellSouth is providing the Reply Affidavit of Mr. Eric Fogle to correct the record.

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[243] *See* BellSouth Comments at 78.

[244] *See* BellSouth Reply App. at 4. The Commission should, however, make clear that there is no independent Section 271 line sharing obligation and reject Covad's attempts to improperly claim a continued basis to line sharing other than as specified in the transition plan of the *Triennial Review Order*. Covad has refused to modify its interconnection agreement and in state proceedings over this issue state commissions are reaching divergent results. If any action is needed on this issue, it is simply to clarify unequivocally that national policy concerning line sharing is the transition plan only which must be included in interconnection agreements and that no independent line sharing obligation exists under section 271. *See* BellSouth Reply App. at 7-9 (excerpts of state commission agenda sessions concerning the dispute between BellSouth and Covad; the Georgia and Florida commissions have not required Covad to modify its interconnection agreement; the Tennessee Regulatory Authority appears to have properly ordered the transition plan).

[245] *See e.g.* Earthlink's Comments; Covad's Comments.

There are few issues involved in this proceeding that have been as soundly rejected as line sharing. One would reasonably assume the matter to be closed. Unfortunately, several commenters are back, trying once again to have the Commission put back in place a regulatory regime that disincents investment and relies on synthetic competition in a subsection of the market. The issue these commenters refuse to recognize is that competition for communications services is no longer between incumbent and competitive LECs but between entities that can provide a wide array of services to meet consumers' communications needs. Cable modem providers, wireless providers, satellite providers, and even power companies[246] all provide a link to the end user. Through these links, these entities are providing bundles of services that include voice, data, and in some cases video. This intermodal competition is precisely what the D.C. Circuit had it mind when it vacated the Commission's original line sharing decision.[247] Consistent with this decision, and the Commission's decision in the *Triennial Review Order*, it makes no economic sense, nor does it advance any competitive policy position to force one competitor – ILECs – to unbundle spectrum on a copper loop in order to allow a subset of entities to provide a limited set of services to consumers. The commenters attempt to carve out a niche market for the provision of Internet access through an unbundled high frequency portion of a copper loop is simply an outdated business model.

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[246] "FCC Adopts Rules for Broadband Over Power Lines to Increase Competition and Promote Broadband Service to All Americans," FCC News Release (Oct. 14, 2004).

[247] *USTA I,* 290 F.3d at 428 ("the Commission, in ordering the unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite").

### B. Commenters Distort the Facts Supporting the Commission's Basis for Phasing Out Line Sharing in the *Triennial Review Order.*

Commenters supporting the reinstatement of line sharing contend that the bases for the Commission's decision to eliminate line sharing in the *Triennial Review Order* are invalid, even though that decision was rendered last year and was affirmed by the D.C. Circuit seven months ago. The Commission's bases for eliminating line sharing in the *Triennial Review Order* are even more compelling today.

#### 1. Line Splitting Is a Viable Option for CLECs.

Despite their claims to the contrary, if a CLEC desires to continue to be only a broadband Internet access provider, it can do so through line splitting. BellSouth has been and continues to be a leader in developing and supporting line splitting processes.[248] Moreover, the fact that AT&T has claimed it has curtailed its residential service is no reason to re-instate line sharing.[249] Although Covad asserts that AT&T's decision limits the number of voice CLECs that it can partner with in order to provide dual services to customers, this claim lacks merit for two reasons.

First, Covad markets mainly to business customers, thus AT&T's pull out of the residential market has little impact on Covad. Second, AT&T has made clear its plans to offer VoIP services to the residential market. Covad is uniquely positioned, as a stand-alone broadband service provider with significant experience in ordering UNE-loops, to benefit from AT&T's strategies. Specifically, AT&T's VoIP service requires an existing broadband service, and broadband services that do not require an underlying voice service (which is exactly what

[248] *See* Fogle Reply Affidavit, ¶ 11.

[249] As BellSouth pointed out in its Initial Comments, these AT&T's claims are suspect.

Covad has been ordering for years to support its SDSL based broadband services) to provide the transmission facility are the most likely candidates to be bundled with AT&T's VoIP offering.[250]

### 2. CLECs Can Use the Entire Loop to Provide a Variety of Services.

CLECs can obtain the entire loop (UNE-L) to provide a bundle of services to the end user. In fact, this is precisely what other providers (ILECs, cable modem, wireless, satellite) are doing – they are using the resources of access facility to provide as many services to the end user as are possible. Covad baldly argues that UNE-L is not viable because "intractable hot cut problems have not been resolved." This, of course, is completely false, and any problems in the hot cut process are of Covad's own making.[251]

### 3. Carriers Can and Should Provision Multiple Services to Consumers in Order to Recoup the Cost of Facilities.

The alleged lack of the ability to provision video is a smoke screen. Covad claims the Commission relied on the ability of providers to offer video over DSL as a means to recoup costs of the loop, which Covad claims is not a current option. While the Commission did make this finding, it did not view video in a vacuum but as one of many possible services that could be offered as a bundle or package to the end user. As BellSouth has pointed out on many occasions, CLECs, just as ILECs, can use the loop to offer multiple services. The Commission should not, therefore, perpetuate a business case based on a single service, especially when end users express a desire for bundled services from one provider. Moreover, video is a very viable option over DSL.

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[250] See Fogle Reply Affidavit, ¶ 4.

[251] *Id.*, ¶ 17.

### 4. Commercial Agreements for Line Sharing Will Occur if There Is an Adequate Demand.

Some commenters argue that the lack of commercial agreements for line sharing indicates that ILECs are not willing to enter into such agreements. However, this argument makes little sense given Covad's success in negotiating such agreements.

### 5. CLECs Using Line Sharing have an Unfair Cost Advantage Over LECs that Use the Entire Loop.

Covad contends the final reason the Commission found for eliminating line sharing was "cost allocation problems." In support of its decision to eliminate line sharing, however, the Commission's concern regarding the difficulty of cost allocation was the competitive disadvantage line sharing LECs had over full service LECs. The Commission recognized that with no accurate basis to allocate costs, most states simply required ILECs to charge zero for the high frequency portion of the loop ("HFPL"). The Commission stated, "The result is that competitive LECs purchasing only the HFPL have an irrational cost advantage over competitive LECs purchasing the whole loop and over incumbent LECs." The Commission went on to find that this cost advantage goes away by eliminating line sharing and allowing CLECs to line split or to purchase and use the entire loop. Absolutely nothing has changed since the Commission made that finding in the *Triennial Review Order*; the same analysis applies today. Moreover, Covad's proposal of the HFPL costs from the Qwest agreement as a national floor for such costs is unreasonable considering arbitrary nature in assigning such costs and the different cost structures between the different companies.

### C. The Commission Should Reject Requests for Alleged Clarification of Its Hybrid Loop Unbundling and Network Modification Rules.

The CLEC Coalition's request for "clarification" of network modification rules should be denied as vague and factually unsupported.[252] In any event, the Commission just issued an Order germane to this point, which should resolve the concerns expressed.[253] Parties aggrieved by the Commission's actions in relation to hybrid loop unbundling or network modification polices can take appropriate action in the context of that proceeding.[254]

## X. CONCLUSION

The Commission cannot adopt permanent rules that disregard the explicit directives of the D.C. Circuit and the Supreme Court, as many carriers would have it do. Nor can the Commission fail to provide the clarity and direction that is vital to the telecommunications industry. This clarity and direction can occur through the adoption and application of a narrow and rational impairment standard which eliminates access to unbundled local circuit switching and eliminates unbundled access to high capacity transport, loops, and dark fiber in those central offices with 5,000 or more business lines.

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[252] Loop and Transport Coalition Comments at 122-25.

[253] "FCC Removes More Roadblocks to Broadband Deployment in Residential Neighborhoods," FCC New Release (Oct. 14, 2004).

[254] In any event, the attached Milner affidavit demonstrates that to the extent BellSouth's costs for providing routine network modifications have already been included in the UNE rates established by the state commissions, BellSouth does not seek to recover those same costs against from CLECs through a separate network modification charge. The Milner affidavit further demonstrates that it is inappropriate to make the comparisons between wholesale and retail provisioning that the CLEC Coalition advocates. ILECs incur costs in providing network modifications, and when those costs have not been accounted for in UNE rates established by state commissions, ILEC should be able to recover those costs from its customers. Milner Reply Affidavit, ¶¶ 18-20.

Respectfully submitted,

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Date: October 19, 2004

**REDACTED INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 04-313 AND CC DOCKET NO. 01-338**

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 19th day of October 2004 served the following parties to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic filing and/or by placing a CD of the same in the United States Mail, addressed to the parties listed on the attached service list:

/s/ Lynn Barclay
Lynn Barclay